

(A)
No. 98-591-CFX

Title: Albertsons, Inc., Petitioner
v.
Hallie Kirkingburg

Docketed:
October 8, 1998

Court: United States Court of Appeals for
the Ninth Circuit

Entry Date

Proceedings and Orders

Oct 6 1998	Petition for writ of certiorari filed. (Response due November 7, 1998)
Nov 6 1998	Motion of American Trucking Associations, et al. for leave to file a brief as amici curiae filed.
Nov 9 1998	Motion of United Parcel Service of America, Inc. for leave to file a brief as amicus curiae filed.
Nov 9 1998	Brief of respondent Hallie Kirkingburg in opposition filed.
Nov 24 1998	DISTRIBUTED. December 11, 1998
Jan 4 1999	REDISTRIBUTED. January 8, 1999
Jan 8 1999	Motion of American Trucking Associations, et al. for leave to file a brief as amici curiae GRANTED.
Jan 8 1999	Motion of United Parcel Service of America, Inc. for leave to file a brief as amicus curiae GRANTED.
Jan 8 1999	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 22, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 24, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT April 28, 1999.

Feb 22 1999	Joint appendix filed.
Feb 22 1999	Joint appendix in two volumes.
Feb 22 1999	Brief of petitioner Albertsons, Inc. filed.
Feb 22 1999	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Feb 22 1999	Brief amici curiae of Senators Harkin and Kennedy, et al. filed. VIDED.
Feb 22 1999	Brief amici curiae of American Trucking Associations, et al. filed.
Feb 22 1999	Brief amicus curiae of United Parcel Service of America, Inc. filed.
Feb 22 1999	LODGING consisting of one spiral bound copy of "Qualifications of Drivers- Vision, Diabetes, Hearing and Epilepsy", by Conwal Inc. (May 30, 1997), submitted by counsel for the petitioner.
Mar 17 1999	CIRCULATED.
Mar 24 1999	Brief of respondent Hallie Kirkingburg filed.
Mar 24 1999	Brief amicus curiae of National Employment Lawyers Association filed.
Mar 24 1999	Brief amici curiae of Justice for All, et al. filed.
Mar 24 1999	Brief amici curiae of James Strickland, Sr., et al. filed.
Mar 24 1999	Brief amicus curiae of United States filed.
Mar 25 1999	Motion of Solicitor General for leave to participate in

Entry Date

Proceedings and Orders

Apr 5 1999	oral argument as amicus curiae and for divided argument filed. Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 8 1999	Record filed.
Apr 9 1999	Record filed.
Apr 12 1999	Reply brief of petitioner Albertsons, Inc. filed.
Apr 28 1999	ARGUED.

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No. _____

OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a monocular individual is "disabled" per se, under the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12112(a) (1994).
2. Whether a monocular driver of a commercial motor vehicle, who failed to meet the minimum Department of Transportation's vision requirements, is a "qualified" individual under the ADA.
3. Whether an employer must adopt an experimental vision waiver program as a means of "reasonable accommodation."

List of Parties

The parties before the Court, and the parties to the proceeding below are identical.

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Rule 29.1 Listing

Albertsons has no parent companies nor nonwholly owned subsidiaries to list.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Albertsons, Inc. respectfully petitions for a writ of
certiorari to review the judgment and opinion of the United
States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for
the Ninth Circuit (App., *infra*, 1a-33a) is reported at 143 F.3d
1228 (1998). By order entered July 8, 1998, the Ninth
Circuit denied the petition for rehearing and suggestion for
rehearing en banc (App., *infra*, 34a). The opinions of the
district court (App., *infra*, 35a-45a) are unreported.

JURISDICTION

On May 11, 1998, the United States Court of Appeals
for the Ninth Circuit entered its order and opinion in this
case. On July 1, 1998, the United States Court of Appeals for
the Ninth Circuit entered its order and amended opinion in

this case. The United States Court of Appeals for the Ninth Circuit entered its order denying the petition for rehearing of Albertsons, Inc., and the suggestion for rehearing en banc on July 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes involved are as follows:

42 U.S.C. §12112(a)

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12111(8)

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For purposes of this subchapter,

consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

29 CFR §1630.2(m)

(m) Qualified individual with a disability

means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See section 1630.3 for exceptions to this definition).

42 U.S.C. §12102(2)

(2) Disability

The term "disability" means, with respect to an individual--

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

29 CFR §1630.2(i)

(i) Major Life Activities

means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 CFR §1630.2(n)(n) Essential functions. -

- (1) In general. The term "essential function" means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
- (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
 - (i) The function may be essential because the reason the position exists is to perform that function;
 - (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
 - (iii) The function may be highly specialized so that the incumbent in the position is

hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

29 CFR §1630.2(j)

(j) Substantially Limits

(1) The term "substantially limits" means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a

major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

- (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
 - (i) The nature and severity of the impairment;
 - (ii) The duration or expected duration of the impairment; and
 - (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.
- (3) With respect to the major life activity of "working" --
 - (i) The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
 - (ii) In addition to the factors listed in

paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

- (A) The geographical area to which the individual has reasonable access;
- (B) The job from which the individual has been disqualified because of an impairment, and the number of types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
- (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

42 U.S.C §12113(a),(b)

- (a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or

tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. §12111(3)

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

49 CFR §391.41(b)(10)

(b) A person is qualified to drive a commercial motor vehicle if that person--

- (10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant

binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

STATEMENT OF THE CASE

Facts

Albertsons hired plaintiff as a truck driver at the Portland, Oregon Distribution Center on August 21, 1990. On December 3, 1991, plaintiff fell from a truck while on the job and injured his head, hand, and shoulder. Plaintiff was off work due to the injury until he was released to return to work in November of 1992.

All over the road truck drivers are required by the federal government to be certified as medically competent to drive. 49 CFR §391.41(a). While plaintiff was an employee of Albertsons, he was erroneously certified twice by two different medical examiners. In regard to vision standards, Department of Transportation (hereafter "DOT") regulations require a minimum acuity score of 20/40 corrected in each eye. 49 CFR §391.41(b)(10).

Although plaintiff's medical examination on August 18, 1990 revealed plaintiff had acuity ratings of 20/25 vision in the right eye and 20/70 (a failing grade) in the left eye, the medical examiner incorrectly certified that plaintiff met the requirements under the Motor Carrier Safety Regulations, 49 CFR §391.41-391.49. Plaintiff's medical examination form of February 5, 1991, showed plaintiff had acuity ratings of

20/25 vision in the right eye and 20/100 (a failing grade) in the left eye, yet, once again, a medical examiner certified that plaintiff met the requirements under the Motor Carrier Safety Regulations.

Plaintiff testified that his vision in his left eye has always been 20/200 and that it has not changed. Albertsons historically has deferred to the medical certifications of its examining physicians, as evidenced by their completion of the DOT certification cards.

Albertsons' company policy requires that all drivers are recertified (DOT certification) when they return from a long-term injury. Thus, when plaintiff returned from his nearly one year medical absence, Albertsons asked him to recertify with a physical examination from the Eubanks clinic on November 6, 1992. Dr. Douglas Eubanks, D.O., examined plaintiff and correctly found his acuity rating to be 20/20, corrected, in the right eye and 20/200, corrected, (a failing grade) in the left eye. Dr. Eubanks found that plaintiff failed to meet the minimum vision requirements under DOT standards and so advised Albertsons' Transportation Department on November 6, 1992.

At all times, plaintiff insisted on returning to work as a driver. Albertsons' consistent policy has been only to employ drivers who meet or exceed the minimum DOT standards. Albertsons has never accepted DOT waivers.

While Albertsons did not believe plaintiff was otherwise qualified to drive a commercial vehicle, it did consider plaintiff for and offered to plaintiff other jobs. After terminating plaintiff's employment, Albertsons offered plaintiff the positions of Yard Hostler (moving trailers at the Distribution Center) and Tire Man. When Albertsons realized that the Yard Hostler position also required DOT certification, the Company withdrew the offer before it was accepted. Plaintiff refused the Tire Man position because of

the pay cut he would have to take. General Manager of the Distribution Center, Frank Riddle, and Corporate Labor Relations personnel decided to terminate plaintiff from his job as a commercial truck driver. Mr. Riddle reviewed plaintiff's DOT file before terminating him. Plaintiff's DOT file showed he did not meet the DOT minimum requirements of the DOT manual. Additionally, Albertsons' Driver Manual states, "As an Albertson's driver, you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." Under these standards, Plaintiff should never have been allowed to drive for Albertsons at all.

Frank Riddle directed Theodore Sturgill, the Transportation Manager, to terminate Plaintiff's employment because he did not meet the minimum DOT requirements. Mr. Sturgill, and Personnel Manager Charles Norris terminated plaintiff's employment with the Company on November 20, 1992 for failing the DOT physical. Plaintiff obtained a vision waiver from the DOT¹ on February 2, 1993. Albertsons did not reconsider plaintiff's termination after he notified them that he had received the vision waiver. Employers have never been required to accept vision waivers. Further, Albertsons has never accepted waivers from DOT minimum requirements because of concern for the safety of its drivers and that of the general public.

¹ The experimental vision-waiver program was invalidated August 2, 1994. *Advocates for Highway Safety v. Federal Highway Administration*, 28 F.3d 1288, 1294 (D.C. Cir. 1994). The court found the Federal Highway Administration (FHWA) adopted the waiver program contrary to law. *Id.* The FHWA failed to determine that a waiver was consistent with the safe operation of commercial motor vehicles. *Id.*

Proceeding Below

Plaintiff filed a complaint in the United States District Court for the District of Oregon alleging that Albertsons violated the ADA by failing to accommodate him by: 1) not waiting a reasonable time to allow plaintiff to obtain a vision waiver; 2) not allowing plaintiff to return to work once he received the vision waiver; and 3) not reassigning him to other suitable work. The jurisdiction of the district court was invoked under the ADA, 29 U.S.C. §12110, et. seq., and under 28 U.S.C. §1331 (general federal question jurisdiction).

Albertsons filed for summary judgment on the ground that: 1) Plaintiff was not a qualified individual, with or without accommodation, under the ADA because he could not meet the DOT vision standards, which was an essential function of his job.

The district court granted Albertsons' Motion for Summary Judgment, holding that: 1) Kirkingburg was not a qualified individual under the ADA because he could not perform the essential functions of the job; 2) Requiring Albertsons to grant Kirkingburg a leave of absence to obtain a vision waiver was not a reasonable accommodation, as such accommodation would be futile; 3) The ADA does not obligate Albertsons to employ truck drivers who have received vision waivers; and 4) Albertsons may rely on the DOT vision standards and need not make an individual assessment of plaintiff's ability to drive.

Plaintiff filed a Motion for Reconsideration with the district court on the ground that the court did not address whether one form of reasonable accommodation would have been to reassign plaintiff to a yard hostler position (or to another available and suitable position). The district court denied plaintiff's Motion for Reconsideration, stating that plaintiff failed to provide evidence that the yard hostler

position was available when he was terminated and that since driving was an essential part of that position, such accommodation would be futile.

Kirkingburg appealed to the United States Court of Appeals for the Ninth Circuit. In a decision by Circuit Judge Reinhardt, the Ninth Circuit reversed the district court's decision and remanded the case for trial. The Ninth Circuit held: 1) Kirkingburg was disabled under the ADA and its implementing regulations, if the facts were as he alleged; 2) There was a genuine issue of material fact regarding whether Albertsons perceived Kirkingburg as disabled; 3) Kirkingburg was a qualified individual under the ADA, because he established a genuine issue of material fact with respect to whether he could perform the essential functions of a commercial truck driver; 4) By refusing to accept the FHWA waiver, Albertsons chose to adhere to only a portion of the federal regulations; 5) Albertsons was not free to disregard the waiver program for the reason it asserted at the time of Kirkingburg's termination, because there was no evidence that Albertsons believed the waiver program to be invalid; 6) Albertsons failed to produce any evidence that Kirkingburg and other waiver recipients posed a direct safety threat.

Circuit Judge Rymer filed a dissent, which stated that: 1) Kirkingburg failed to show that he could perform the essential functions of his job because he did not meet the DOT visual requirements; 2) The ADA does not require Albertsons to accept an experimental waiver that the FHWA (at the time of plaintiff's termination) had not found consistent with the safe operation of commercial motor vehicles; and 3) Since Albertsons offered to accommodate Kirkingburg's disability by another job (which Kirkingburg rejected) it fulfilled its ADA obligations.

Albertsons filed a Petition for Rehearing and

Suggestion for Rehearing En Banc, which was denied on July 8, 1998.

REASONS FOR GRANTING THE PETITION

As the Ninth Circuit acknowledged (App., *infra*, 15a, fn.4), its holding that a monocular driver is "disabled" per se under the ADA conflicts with *Still v. Freeport-McMoran, Inc.* 120 F.3d 50 (5th Cir. 1991). This issue is one which has resulted in conflicts in other circuits, as well, and the need for guidance of the Court is significant. Although another appellate court has recently asked the Court to review this issue (*Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. den.*, 118 S.Ct. 693 (Jan. 12, 1998)), this issue is timely and proper, as the instant case provides a much less fact-bound vehicle for review.

Further, the decision below is erroneous, and the issues that it addresses are of national significance and exceptional importance and directly affect the safety of the general public. The Ninth Circuit's opinion overlooks long-standing, well-established Federal Regulations in favor of an experimental program that was (and is) not an official part of federal law. The decision contravenes the vision requirements of the Federal Regulations that have been unchanged since 1970. If allowed to stand, the decision below will lead to much confusion over the parameters of what is considered "federal law." Additionally, this decision will *force* employers to hire and maintain a workforce that could potentially pose a safety hazard to themselves and the general public.

I. The Court of Appeals' Interpretation of 42 U.S.C. §12102(2) Conflicts with the Interpretation of the Fifth Circuit, and Aggravates the Existing Split in the Circuit Courts.

The decision below held that plaintiff has presented a genuine issue of material fact regarding whether or not he was "disabled" under the meaning of the ADA, relying, in part, on evidence that was not in the record. The ADA provides coverage for a "qualified individual with a disability." 42 U.S.C. § 12112(a) (1994). The ADA defines "disability" as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment;
- (C) or being regarded as having such an impairment. 42 U.S.C. § 12102(2). (emphasis added).

The Ninth Circuit next looked to the implementing regulations to assist in defining "disability" and appeared to rely heavily on the language that states (in relevant part) that "an impairment is substantially limiting if it 'significantly restricts as to the ... *manner* ... under which an individual can perform a major life activity ... as compared to the ... *manner* under which the average person in the general population can perform that same major life activity.'" (App., *infra*, 14a, *citing*, 29 C.F.R. § 1630.2(j)(1)(ii) (1993)).

After stating that "Kirkingburg is substantially limited in the major life activity of seeing," the Ninth Circuit goes on to explain that Kirkingburg's "brain has developed

subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner*, in which he sees differs significantly from the *manner* in which most people see.” (App., *infra*, 14a) (emphasis original). However, significantly, this information, upon which the court relies for the determination that plaintiff is “disabled,” is simply not in the record. The Ninth Circuit should not be allowed to issue a decision on facts that are not before it.

Further the Ninth Circuit, in determining that plaintiff’s monocular vision was a “disability” under the ADA, relied on an Eighth Circuit opinion, *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997). *Doane* held that a monocular-visioned person was “disabled” because “the *manner* in which he performed the major life activity of seeing was different.” (App., *infra*, 15a, citing, *Doane* at 627). However, the court, in a footnote, cited to a Fifth Circuit decision that directly contradicted the *Doane* case by holding “as a matter of law, that a monocular-visioned individual was not disabled because he was ‘able to perform normal daily activities.’” (App., *infra*, 15a, fn.4 (emphasis added), citing, *Still v. Freeport-McMoran, Inc.*, 120 F. 3d 50, 52 (5th Cir. 1997)). Until the Ninth Circuit’s decision in the instant case, it had not decided this issue. The need for uniformity within the circuits is strongly needed, as the determination of an whether an individual is “disabled” is the cornerstone of an ADA claim. This issue needs to be resolved.

II. The Decision of the Court of Appeals is Erroneous.

The decision below held that Albertsons had a duty to accept plaintiff’s FHWA vision waiver, stating that Albertsons “has chosen to adhere to only a part of the [DOT]

regulations, while ignoring the waiver program” (App., *infra*, 19a). The opinion further states that Albertsons “cannot selectively adopt and reject federal safety regulations” (App., *infra*, 27a). This statement is not only patently incorrect, but, it is inherently a dangerous one.

The vision waiver program was not a part of the regulations in 1992, when Albertsons made the decision to adhere to the regulations, nor has it ever been a part of the regulations. To the contrary, “[t]he vision study waiver program was a part of the FHWA’s ‘efforts to review, and eventually amend its vision requirements through a rulemaking action’” (App., *infra*, 30a, citing, 57 Fed. Reg. 31,458 (1992)). The agency, itself, defined the vision waiver program as a “study” to provide it with necessary “empirical data.” *Id.* It was not an official rule or regulation, it was solely an experiment. Significantly, this experiment has never been found to be successful enough to warrant amending the actual regulations. The court’s holding that the FHWA vision waiver program is a part of the DOT Regulations is in error, and should not be allowed to stand, as it lends itself to confusion regarding the definition of “federal law.”

The vision requirements in effect in November 1992 (when Kirkingburg was examined by the physician who informed Albertsons that Kirkingburg did not meet the minimum standards) had been unchanged since 1970 (and are, at the present time, still unchanged).

The minimum vision requirements established by DOT for operators of commercial motor vehicles require:

“distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at

least 20/40 (Snellen) in both eyes with or without corrective lenses ***." 49 C.F.R §391.41(b)(10).

Forcing Albertsons and other employers to accept a vision waiver would be contradictory to the long-established, and only official, DOT vision requirements. The effect on employers of drivers of commercial motor vehicles could lead to employers being forced to ignore the established federal regulations.

III. The Questions Presented are Important

In order for employees to enjoy the protection of the ADA, they must not only demonstrate that they meet the definition of "disabled" but must also establish that they are "qualified individuals" under the statute. *See, Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990). The factors considered in determining whether an individual is "qualified" are: 1) whether a person satisfies the requisite skill, experience, education and other job-related requirements of the employment position, and 2) whether with or without reasonable accommodation the individual can perform the essential functions of the position. *See*, 29 C.F.R. § 1630.2(m).

The Ninth Circuit held that plaintiff had established a genuine issue of material fact with respect to his status as a "qualified" individual. Although Albertsons contended that Kirkingburg failed to meet the "essential function" prong of the "qualified individual" test by the fact that he did not meet the minimum requirements of the DOT, the court addressed this issue incorrectly under the "job-related requirement." The correct analysis should have been under both prongs.

"Essential functions" are defined by the regulations as "the fundamental job duties of the employment position." 29

C.F.R. § 1630.2(n). In order to work as a commercial driver for Albertsons, an individual must meet or exceed the standards set out in the DOT Regulations. Albertsons does not allow drivers to drive its commercial vehicles without meeting or exceeding the standards set out in the DOT Regulations. Kirkingburg did not meet the minimum DOT standards, thus, he could not drive commercial vehicles for Albertsons. Driving is a "fundamental job duty" of Albertsons' position of commercial truck driver. Contrary to the Ninth Circuit's holding, because he did not meet the DOT minimum standards, Kirkingburg could not perform the essential function of a commercial truck driver for Albertsons.

Second, the Ninth Circuit did not ultimately address whether Kirkingburg met the "job-related requirement." Rather, the court attacked the legality of Albertsons' enforcement of the job-related requirement that commercial vehicle drivers meet the minimum standards of the DOT Safety Regulations "as applied" (App., *infra*, 18a). The court, again, relies on its misplaced understanding of the FHWA's vision waiver program and that program's relationship with the Federal Regulations. As stated above, the waiver program of the FHWA was never a part of the Federal Regulations, rather it was an experimental program. The Court is strongly urged to define and establish the existing relationship between the waiver program and the Federal Regulations.

Additionally, the Ninth Circuit disputes Albertsons' argument that it was concerned with the safety of the vision waiver program. The court does not provide any support for its assertion that Albertsons' decision not to accept vision-waivers was not based on safety. The only support cited by the court is a 1994 FHWA Notice, 59 Fed. Reg. 59,386, 59,389, which announced that the waiver program "has been

adjudged a success by the FHWA" (App., *infra*, 20a). Thus, the court relies on a Notice that was issued two years after Mr. Kirkingburg left the employment of Albertsons. It is clearly not a Notice of which Albertsons would have, or even could have, been aware in deciding the safety issues involved in accepting a vision waiver (Although, that decision never had to be made, as Kirkingburg did not have a valid waiver at the time of his termination.).³ All that Albertsons was aware of at the time of plaintiff's termination was the fact that the vision waiver program was "experimental" and not a part of the Federal Regulations. Thus, it is reasonable to conclude that Albertsons would be rightfully concerned with the safety issue of accepting a vision waiver.

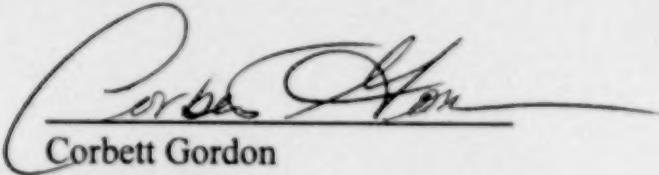
Accordingly, because of the overriding public safety issues involved, coupled with the need for uniformity among the circuits regarding the definition of a disability under the ADA, and the erroneous nature of the Ninth Circuit's decision, Petitioner urges this Court to grant the petition for review.

³ Significantly, Kirkingburg did not have a vision-waiver at the time of his termination. He did not receive a vision-waiver until 3 months after his termination. Therefore, even if Albertsons had to apply both the DOT Regulations and the FHWA's vision-waiver, and not pick and choose which to follow (as the Ninth Circuit held), plaintiff still would not escape his termination. At the time of his termination, Kirkingburg had not satisfied either the DOT vision requirements contained in the Federal Regulations, or the requirements of the FHWA vision waiver. The facts at issue here are inconsistent with the result reached by the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for a writ of certiorari, reverse the Ninth Circuit, and affirm the district court's decision.

Respectfully Submitted,



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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HALLIE KIRKINGBURG,)	No. 96-35002
)	
<i>Plaintiff-Appellant,</i>	)	D.C. No.
	)	CV-95-549-PA
v.)	
	)	ORDER AND
ALBERTSONS, INC.,	)	AMENDED
	)	OPINION
<i>Defendant-Appellee.</i>)	

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted
July 8, 1997--Portland, Oregon

Filed May 11, 1998
Amended July 1, 1998

Before: Alfred T. Goodwin, Stephen Reinhardt, and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Rymer

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals reversed a judgment of the district court. The court held that under the Americans with Disabilities Act (ADA), a private employer may not impose Department of Transportation (DOT) visual acuity regulations on a truck driver who has received a waiver of the vision requirements from the Federal Highway Administration (FHWA).

Appellant Hallie Kirkingburg was a commercial truck driver with almost 20 years experience and an impeccable driving record. In 1990, appellee Albertson's, Inc. hired Kirkingburg as a driver. A physician certified that his vision met the requirements of DOT regulations. Kirkingburg performed well on a 16-mile road test, and earned an evaluation of "superior driving skill" from an Albertson's transportation manager.

Kirkingburg had poor visual acuity (20/200) in his left eye, and was deemed monocular, due to an uncorrectable condition. His left-eye acuity rating was below DOT general regulations, but the rating of his right eye was 20/20 with corrective lenses.

After Kirkingburg was on the job for over a year, he suffered a non-driving injury and did not return to work for almost a year. When he returned, Kirkingburg had to be recertified. This time, the examining physician determined

that his left-eye acuity was 20/200 and refused to certify him.

Kirkingburg applied for a waiver of the DOT vision requirements under the FHWA's vision waiver program, which was instituted to bring DOT standards into compliance with the ADA. To obtain the waiver, Kirkingburg had to show that he was a commercial driver, could drive well despite his monocular vision, and had a good driving record. Kirkingburg informed Albertson's that he had applied for the waiver. Albertson's fired him on the ground that all its drivers had to meet or exceed DOT standards.

Kirkingburg obtained the FHWA waiver, but Albertson's refused to reconsider his discharge.

Kirkingburg sued Albertson's under the ADA. Albertson's contended that he was not entitled to relief under the ADA because he was not "disabled" within the meaning of the statute, and if he was, he was not "otherwise qualified" for the position of truck driver. With respect to its job-related requirements, Albertson's asserted that federal law mandated that its drivers meet the regular DOT vision requirements, that it had the right to adopt the regular DOT standards as its own, and that its refusal to accept FHWA waivers was justified because drivers who do not meet the basic standards pose a direct threat to safety.

The district court granted summary judgment for Albertson's, concluding that Kirkingburg failed to establish a prima facie case under the ADA. Kirkingburg appealed.

[1] To survive a motion for summary judgment, Kirkingburg had to demonstrate a genuine issue of material fact regarding whether he was a disabled person within the

meaning of the ADA; whether he was otherwise qualified for the position, that is, whether he was able to perform the essential functions of his job, with or without reasonable accommodation; and whether the employer terminated him because of his disability.

[2] The ADA states that a "disability" is a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment. Under implementing regulations, an impairment is substantially limiting if it significantly restricts as to the condition, *manner*, or duration under which an individual can perform a particular major life activity, as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity. Major life activities include seeing.

[3] Kirkingburg presented uncontroverted evidence that he suffered from a condition resulting in his being almost totally blind in his left eye. There was no question that Kirkingburg was substantially limited in the major life activity of seeing. Although his body compensated for his disability, the *manner* in which he saw differed significantly from the *manner* in which most people see. Kirkingburg saw using only one eye; most people see using two. Under the statute and implementing regulations, Kirkingburg was therefore disabled, if the facts were as he alleged.

[4] Albertson's contention that Kirkingburg was not disabled because he was not totally blind was inconsistent with the expansive goals of the ADA, which was drafted in broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination.

[5] An expansive reading of the statutory definition of "disability" does not leave employers unduly exposed to liability. The ADA does not require employers to hire or retain any person who is not capable of doing his job properly. It merely prohibits employers from discriminating against qualified workers on account of their disabilities.

[6] There existed a genuine issue of material fact regarding whether Albertson's perceived Kirkingburg as disabled. Even if Kirkingburg were not disabled, his employer's perception of him as having a disability would have been sufficient to bring him under the coverage of the ADA. Because Kirkingburg presented evidence that one of the Albertson's managers described him as "blind in one eye or legally blind," he established a genuine issue as to whether his employer believed that he was disabled.

[7] Under the ADA, Kirkingburg had to show that he was a "qualified individual." In this regard, Kirkingburg had to establish that he satisfied the requisite skill, experience, education, and other job-related requirements of the employment position that he held, and that with or without reasonable accommodation, he could perform the essential functions of his position.

[8] Kirkingburg established a genuine issue of material fact with respect to whether he could perform the essential functions of a commercial truck driver. There was no question that Kirkingburg's experience, and in particular his year of experience as a driver for Albertson's, was evidence from which a reasonable factfinder could have concluded that Kirkingburg was able to perform the essential functions of the job. More pertinent was the fact that Kirkingburg received a FHWA waiver based in part on his

excellent driving record.

[9] The dispositive question was whether Albertson's job-related requirement that Kirkingburg failed to meet was lawful as applied. Albertson's maintained that Kirkingburg could not show that he was qualified because he could not fulfill its requirement of meeting or exceeding the regular DOT vision standards.

[10] Because the FHWA waiver program is part of federal law, and recognizing FHWA waivers is consistent with federal law, Albertson's could not justify its adoption of the regular DOT vision standards as a job-related requirement by asserting that federal law requires its drivers to meet those standards regardless of whether they are qualified for and obtain FHWA waivers. Albertson's did not simply conform its job requirements to the DOT regulations; it chose to adhere to only a part of the regulations, while ignoring the waiver program.

[11] By refusing to accept the FHWA waivers, Albertson's rejected a portion of the federal scheme that was designed to eliminate the discriminatory effects of DOT safety regulations and bring them into compliance with the ADA.

[12] Albertson's was not free to disregard the waiver program for the reasons it asserted at the time it fired Kirkingburg. Because there was no evidence that Albertson's believed the waiver program to be invalid, or that it relied on any such belief as a basis for its refusal to accept the FHWA waiver, it was unnecessary to decide whether such a belief would have shielded it from liability.

[13] Albertson's failed to produce any evidence that Kirkingburg and other waiver recipients posed a direct safety threat. Under the statute, a direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. A "significant risk" means a high probability of harm that is neither remote nor speculative. Drivers who qualify for the waiver program have established that they do not pose a safety threat. Denying a monocular-visioned driver the opportunity to work, in spite of his having demonstrated that he is capable of performing the job safely, is precisely the sort of discrimination that the ADA sought to abolish.

[14] The waiver program was designed to bring the DOT regulations into compliance with the requirements of the ADA, and serves to protect disabled persons against unfounded discrimination. Individuals who secure waivers have been determined to be safe drivers. However one views the other parts of the DOT regulations, the waiver program does not provide a floor for employers; rather it precludes them from declaring that persons determined by FHWA to be capable of performing the job of commercial truck driver are incapable of performing it by virtue of their disability.

Judge Rymer dissented, taking the position that under the ADA, complying with current DOT safety requirements was an essential function of Kirkingburg's job.

COUNSEL

Scott N. Hunt, Portland, Oregon, for the plaintiff-appellant.

Corbett Gordon, Portland, Oregon, for the defendant-appellee.

ORDER

The opinion in this case is amended as follows:

At Slip op. 4623, the first full paragraph, reading "Under the ADA, an employer is prohibited", is DELETED.

OPINION

REINHARDT, Circuit Judge:

Hallie Kirkingburg, a monocular-visioned truck driver, filed an action in district court alleging that his employer, Albertson's, Inc. discriminated against him on account of his visual disability in violation of the Americans with Disabilities Act ("ADA" or "the Act"). 42 U.S.C. § 12112(a) (1994). Albertson's moved for summary judgment, arguing that Kirkingburg had not established a prima facie case under the ADA. The district court agreed with Albertson's and granted summary judgment in its favor. Kirkingburg appeals. We hold that the granting of summary

judgment to Albertson's was erroneous.

The Facts

Since 1979, Hallie Kirkingburg has been driving commercial trucks. His driving record is impeccable -- he has been in only one accident, which was determined to be not his fault, and he has received no citations for moving violations. In 1990, Albertson's hired Kirkingburg as a driver at its distribution center in Portland, Oregon. Prior to starting work for Albertson's, Kirkingburg was examined by a physician who certified that his vision met the requirements established under Department of Transportation ("DOT") regulations.¹ Kirkingburg also performed well on a 16-mile road test that Albertson's administered before it offered him the job. Following the road test, Albertson's transportation manager stated that "It is my considered opinion that [t]his driver possesses superior driving skill to operate safely the type of commercial vehicles listed above." Several months into the job, Kirkingburg was again examined by a physician and his vision was recertified.² Notwithstanding these medical certifications, the visual acuity of Kirkingburg's left

1 According to the DOT regulations, operators of commercial motor vehicles should have a "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) with or without corrective lenses." 49 C.F.R. § 391.41(b)(10).

2 Both medical examinations revealed that Kirkingburg's vision did not meet the applicable standards; neither examination, however, correctly appraised Kirkingburg's actual visual acuity. It is not clear why Kirkingburg received a certification on these two occasions in spite of his failure to meet the required standards.

eye is, and has been since birth, rated 20/200, well below what the general DOT regulations require. The poor vision in his left eye is caused by amblyopia, a condition commonly referred to as "lazy eye," which cannot be corrected. His right eye, however, has a visual acuity rating of 20/20 (with corrective lenses). In short, Kirkingburg's vision is monocular.

In late 1991, after he had been on the job for over a year, Kirkingburg suffered a nondriving, work-related injury when he fell from a truck. As a result of the accident, he did not return to work for almost a year. Albertson's policies require employees who are resuming work after a long-term absence to secure recertification under the DOT standards, and in November 1992, Kirkingburg's vision was again examined. This time, the examining physician correctly determined that the vision in Kirkingburg's left eye was 20/200. Accordingly, the doctor refused to certify him under the DOT regulations and informed Albertson's of these findings.

When Kirkingburg was denied DOT certification, he applied for a waiver of the regular vision requirements under the Federal Highway Administration's ("FHWA") vision waiver program, which was instituted in order to bring DOT's standards into compliance with the ADA without sacrificing highway safety. The establishment of this program fulfilled Congress's expectation that DOT would revise its safety regulations in order to end unfounded discrimination against drivers with visual disabilities. *See generally Rauenhurst v. United States Dep't of Transp., Fed. Highway Admin.*, 95 F.3d 715 (8th Cir. 1996) (detailing the history of the FHWA vision waiver program). Under the program, FHWA makes vision waivers available to certain

experienced commercial truck drivers who have clean driving records.

In order to obtain a vision waiver under the FHWA program, the applicant, among other things, is required to establish that he has three years of recent experience driving a commercial vehicle without (1) license suspension or revocation, (2) involvement in a reportable accident in which the applicant received a citation for a moving violation, and (3) more than two convictions for any other moving violation in a commercial vehicle. 57 Fed. Reg. 31,458 (1992). In addition, the applicant is required to present proof from an optometrist certifying that his visual deficiency has not worsened since his last examination, that the vision in one eye at least is correctable to 20/40, and that he is "able to perform the driving tasks required to operate a commercial motor vehicle." *Id.* at 31,460. In other words, DOT will waive its regular vision requirements for commercial vehicle drivers, such as Kirkingburg, who have monocular vision, are able to drive well despite that disability, and have good driving records.

Kirkingburg informed Albertson's that he had applied for a waiver under the program, but Albertson's explained that it would not accept a waiver because it had a policy of employing only drivers who "meet or exceed the minimum DOT standards." Consequently, Albertson's fired Kirkingburg from his position as a truck driver. Several months later, when Kirkingburg informed Albertson's that he had in fact obtained a vision waiver, Albertson's once again refused to accept it and declined to reconsider his termination. Kirkingburg brought suit, alleging that Albertson's discriminated against him in violation of the ADA.

DISCUSSION

The Americans with Disabilities Act

When Congress enacted the Americans with Disabilities Act in 1990, it sought to eliminate the barriers that prevent disabled individuals from becoming fully participating members in all aspects of their communities, particularly in the area of employment. In furtherance of Congress's expansively stated goal of equality, the Act prohibits covered employers from engaging in employment practices that discriminate against individuals with disabilities. Specifically, the ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). The ADA contemplates that a person with a disability will be evaluated on the basis of his individual capabilities, not on the basis of society's biases or an employer's preconceptions.

[1] In this case, Kirkingburg claims that his employer violated the ADA by firing him because of his visual disability. In order to survive a motion for summary judgment, Kirkingburg must demonstrate a genuine issue of material fact regarding: (1) whether he is a disabled person within the meaning of the ADA; (2) whether he is otherwise qualified for the position, that is, whether he is able to perform the essential functions of the job, with or without reasonable accommodation; and (3) whether the employer terminated him because of his disability. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996).

Albertson's contends that Kirkingburg is not entitled to relief under the ADA because he is neither disabled nor an otherwise qualified individual. We examine whether Albertson's has established that it is entitled to summary judgment with respect to these two elements of Kirkingburg's ADA claim.³

1. Disabled

Albertson's first contends that Kirkingburg failed to raise a genuine issue of fact regarding whether he is disabled within the meaning of the ADA. We disagree with Albertson's argument that anything short of "legal blindness" in both eyes is insufficient to establish a disability under the ADA -- it is clear that a person who is blind or practically blind in one eye is disabled within the meaning of the Act.

[2] In determining what constitutes a disability under the ADA, we are guided by the definition of the term in the statute, which states that a "disability" is:

- (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such impairment; or
- (C) being regarded as having such an impairment.

³ There is no dispute regarding the third element of Kirkingburg's ADA claim; if he is disabled, he was terminated because of the disability.

42 U.S.C. § 12102(2). The implementing regulations further clarify the statutory definition of a disability. Under the regulations, an impairment is substantially limiting if it "significantly restricts as to the condition, *manner* or duration under which an individual can perform a particular major life activity as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (1993) (emphasis added). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, *seeing*, hearing, speaking, breathing, learning, and working." *Id.* at § 1630.2(j) (emphasis added). In addition, the regulations enumerate the following factors that should be considered in determining whether an individual is substantially limited in a major life activity: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* at § 1630.2(j)(2).

[3] Kirkingburg has presented uncontroverted evidence showing that he suffers from amblyopia, a condition resulting in his being almost totally blind in his left eye. In short, he has monocular vision. Given the nature of the condition and its permanence, there is no question that Kirkingburg is substantially limited in the major life activity of seeing. Kirkingburg's inability to see out of one eye affects his peripheral vision and his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see. To put it in its simplest terms, Kirkingburg sees using

only one eye; most people see using two. Accordingly, under the statute and implementing regulations, if the facts are as Kirkingburg alleges, he is disabled.

The Eighth Circuit recently decided an almost identical question. In *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998), that court held that a monocular-visioned person, who could see out of only one eye because of glaucoma, was "disabled." That the individual had learned to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects did not change his disabled status. *Id.* at 627-28. It was enough to warrant a finding of disability, the court held, that the plaintiff could see out of only one eye: the *manner* in which he performed the major life activity of seeing was different.⁴ *Id.* at 627.

[4] Albertson's contention that Kirkingburg is not disabled because he is not totally blind is plainly inconsistent with the expansive goals of the ADA. The Act was drafted in

⁴ Recently, the Fifth Circuit held as a matter of law that a monocular-visioned individual was not disabled because he was "able to perform normal daily activities." *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997). We think this reasoning is inconsistent not only with the regulations, but with the Act itself. Whether an individual is disabled within the meaning of the Act does not depend, contrary to the Fifth Circuit's suggestion, on whether the individual can go about his daily business in spite of the impairment. Instead, the appropriate inquiry in cases such as this is whether, as a result of a physical impairment, the individual is required to perform a major life activity in a different manner from other persons. Notably, the *Still* court did not cite or discuss 29 C.F.R. § 1630.2(j)(1)(ii) in reaching its decision. Accordingly, we agree with the Eighth Circuit's analysis and reject the Fifth Circuit's.

broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination -- it was not drafted narrowly to protect only those with the most severe disabilities. See *Arnold v. United Parcel Svc., Inc.*, 1998 WL 63505, at *7 (1st Cir., Feb. 20, 1998)

("Conceptually, it seems more consistent with Congress's broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination.").

[5] We also note that an expansive reading of the statutory definition of a "disability" does not leave employers unduly exposed to liability. The ADA does not require employers to hire or retain in service any person who is not capable of doing his job properly. It merely prohibits employers from discriminating against qualified workers on account of their disabilities. The Act contains several provisions that adequately protect the employer's interests. For example, an individual seeking the protection of the Act must demonstrate that he is "qualified" for the job in spite of his impairment. 42 U.S.C. §§ 12111(8), 12112(a). And, if accommodations are necessary to enable the employee to perform the essential functions of the job, an employer will only be required to make such accommodations if they are "reasonable," in light of the costs or other burdens they impose on the employer. *Id.* at § 12111(9), (10).

[6] As an alternative ground for our decision, we note that there exists a genuine issue of fact regarding whether Albertson's perceived Kirkingburg as disabled. Thus, even if Kirkingburg were not disabled, his employer's perception of him as having a disability would be sufficient to bring him under the coverage of the Act. 42 U.S.C. § 12102(2)(c).

Because Kirkingburg has presented evidence showing that one of Albertson's managers described him as "blind in one eye or legally blind," he has established a genuine issue as to whether his employer believed he was disabled.

2. Qualified

[7] Under the ADA, Kirkingburg must show not only that he suffers from a disability, but also that he is a "qualified individual." *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990). In this regard, Kirkingburg must establish (1) that he "satisfies the requisite skill, experience, education and other job-related requirements of the employment position [he] holds," and (2) that with or without reasonable accommodation, he can perform the essential functions of the position. 29 C.F.R. § 1630.2(m); see also *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 807-09 (5th Cir. 1997) (elaborating on the proper inquiry). We address the two requirements, beginning with the latter.

a. Essential Functions

[8] Kirkingburg has, at the least, established a genuine issue of material fact with respect to whether he can perform the essential functions of a commercial truck driver. The regulations define the term "essential functions" to mean: "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n). There is no question that Kirkingburg's experience as a commercial truck driver, and in particular his year of experience as a truck driver for Albertson's, is evidence from which a reasonable factfinder could conclude that Kirkingburg is able to perform the essential functions of the job. More pertinent to the issues in this case, as we will discuss more fully below, is the fact that

Kirkingburg received a FHWA waiver based in part on his excellent driving record.

Albertson's maintains that an "essential function" of the job is Kirkingburg's ability to meet DOT safety regulations and that because he cannot meet the standards, he is unable to perform an essential function. We think this argument is more properly considered as a challenge to whether Kirkingburg has satisfied the job-related requirements. Accordingly, we turn to that issue.

b. Job-related Requirements

[9] In one sense, the question in this case is the traditional one -- whether Kirkingburg satisfies the first prong of the "otherwise qualified" test, that is, whether he can satisfy the pertinent job-related requirements. Ultimately, however, the dispositive question is actually whether Albertson's job-related requirement that Kirkingburg fails to meet is lawful as applied. Albertson's maintains that Kirkingburg cannot show that he is qualified because he cannot fulfill its requirement of meeting or exceeding the regular DOT vision standards. In this respect, Albertson's makes two separate arguments. First, it contends that federal law mandates that it require that its drivers meet the regular DOT vision standards.⁵ Second, it asserts that, independent

⁵ Albertson's invokes *Buck v. United States Dep't of Transp.*, 56 F.3d 1406 (D.C. Cir. 1995), for the proposition that it should not be compelled to employ a driver who cannot satisfy the regular federal safety standards. In *Buck*, three deaf truck drivers argued that under the Rehabilitation Act (after which the ADA is modeled), "it [was] unlawful for the agency to rely upon a general rule applicable to all hearing-impaired individuals without regard to their actual ability to drive a truck safely." *Id.* at 1408. The D.C. Circuit rejected the petitioners'

of its obligation to ensure compliance with federal law, it has the right to adopt the regular DOT vision standards as its own, and that its refusal to accept FHWA waivers is justified because drivers who do not meet the basic standards pose a direct safety threat. In turn, Kirkingburg challenges the legality of Albertson's requirements and its refusal to recognize his FHWA waiver.

(i) Compliance with Federal Law

[10] As to Albertson's first contention, we think the answer is obvious. Because the FHWA waiver program is part of federal law and recognizing FHWA waivers is perfectly consistent with federal law, Albertson's cannot justify its adoption of the regular DOT vision standards as a job-related requirement by asserting that federal law requires its drivers to meet those standards regardless of whether they are qualified for and obtain FHWA waivers. Albertson's has not simply conformed its job requirements to the relevant DOT regulations; rather, it has chosen to adhere to only a part of the regulations, while ignoring the waiver program.

[11] By refusing to accept FHWA waivers,

argument, finding that the implementation of general safety standards by the FHWA and the agency's *refusal* to establish a waiver program is not violative of the Rehabilitation Act if insufficient evidence exists justifying such waivers. *Id.*

Buck is clearly inapposite to this case. Here, the FHWA has created a waiver program for vision-impaired drivers. The decision to implement the program was well supported by empirical evidence that a number of drivers who do not meet the otherwise applicable vision standards are nevertheless able to operate commercial vehicles safely. Moreover, the FHWA has determined that Kirkingburg is one of them.

Albertson's has rejected a portion of the federal scheme that was specifically designed to eliminate the discriminatory effects of the DOT safety regulations and bring those regulations into compliance with the ADA. See *Rauenhorst v. United States Dep't of Transp., Fed. Highway Admin.*, 95 F.3d 715, 716-17 (8th Cir. 1996). The waiver program was the result of Congress's expectation that DOT would review its regulations in light of the ADA's mandates and "make the necessary changes to its regulations in order to end unwarranted discrimination against the disabled." *Id.* at 717 (footnote omitted). Allowing Albertson's to prevail in this argument would deal a serious blow to the FHWA's efforts to establish regulations that conform to the requirements of the ADA, in particular the Act's mandate that disabled persons be evaluated in light of their individual abilities.

Apparently hoping to convince us that the waiver program is not a legitimate part of the federal regulatory scheme, Albertson's contends further that it should not be compelled to accept a DOT waiver because: (1) the waiver program is experimental, and (2) it has been invalidated by the D.C. Circuit. See *Advocates for Highway & Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994). Neither of these arguments is meritorious.

The waiver program, which was instituted in July 1992, has been adjudged a success by the FHWA. See 59 Fed. Reg. 59,389 (1994) (determining, after two years of study, "that the issuance of waivers to the 2,399 drivers remaining in the study group is consistent with the public interest and the safe operation of commercial motor vehicles"). The success of the program is no surprise, given that waiver recipients are selected on the basis of individual evaluations, under exacting standards. Only drivers who

have exemplary driving records are eligible. Contrary to what Albertson's would have us believe, there is no evidence whatsoever that drivers who have been certified to drive under the waiver program are less safe than drivers who have been certified under the ordinary standards. In fact, quite the opposite appears to be true. In an interim report, the FHWA concluded that "the driving performance of individuals participating in the vision waiver program is better than the driving performance of all commercial vehicle drivers collectively."⁶ *FHWA Interim Monitoring Report on the Drivers of Commercial Motor Vehicles*, 3 (1994).

6 In fact, the excellent safety records of the waiver program participants was cause for reevaluating the program's research methods with respect to its ultimate purpose: to alter the regular vision standards permanently. 59 Fed. Reg. 59386, 59388-90 (1994). To the extent that the program was a "failed experiment," as Albertson's alleges, it was not a failure in terms of the safety performance of those to whom waivers were granted. Its only "flaw" was that preselecting monocular drivers with extraordinary safety records resulted in what may have been unrepresentative and super-safe group of drivers.

Detractors of the program successfully argued to the agency that because only the safest drivers were granted waivers, the safety records of waiver recipients were not reliable indicators of the potential safety records of all monocular-visioned drivers. *Id.* at 59389. Thus, the detractors concluded, the success of the waiver program should not serve as a basis for modifying the regular vision standards so as to render *all* monocular persons qualified to drive commercial trucks. The FHWA agreed and concluded that it needed to adopt a new research method "to develop parameters for performance-based visual standards" that "reflect the actual physical requirements that foster [] safe operation of commercial vehicles." *Id.* at 59389-90. But the agency's decision to change its research methods is of no help to Albertson's in this case, because the decision was based on the highly *successful* track records of the carefully selected group of waiver recipients, including Kirkingburg.

Albertson's also contends that it was not required to accept the FHWA waiver because the D.C. Circuit invalidated the program in 1994. We do not think Albertson's can justify its termination of Kirkingburg and its refusal to accept the waiver on the basis of events that occurred long after its decisions.⁷ See *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759-61 (explaining that evidence of a justification not known to the employer at the time of discharge cannot serve to justify the termination). Additionally, there is nothing in the record before us that suggests that Albertson's decision in November 1992 not to accept the waiver was based on its belief that the program had been invalidly adopted. Instead, on the record before us, it is undisputed that when Albertson's terminated Kirkingburg and refused to accept the waiver, it was *not* because it believed that the program had been invalidly adopted. Rather, the record reflects that Albertson's refused to accept the waiver simply because it believed that it could continue to require its drivers to meet the regular DOT vision standards notwithstanding the lawful issuance of a waiver by the FHWA. In a letter to the Oregon Bureau of Labor & Industries, dated August 23, 1993, Albertson's stated: "Albertson's does not employ drivers who do not meet

⁷ In some respects, this question is analogous to that presented in after-acquired evidence cases in which an employer subsequently discovers a lawful justification for its previously unlawful action. See *O'Day*, 79 F.3d at 758. The general rule in those cases is that the employer cannot use such justifications to support the discharge. However, while it is appropriate in those cases to permit the employer to use the evidence in order to limit the amount of damages it must pay, the after-acquired evidence in this case probably would not affect Kirkingburg's damage award, because the new justification does not involve employee wrongdoing and the FHWA revalidated the waiver program following the D.C. Circuit's decision.

minimum DOT requirements. The fact that Mr. Kirkingburg applied for and received a waiver of the DOT vision requirements, does *not* mean that he meets the minimum qualifications of a DOT driver."

[12] As we discussed above, Albertson's was not free to disregard the waiver program for the reasons it asserted at the time it fired Kirkingburg. Because there is no evidence in the record indicating that Albertson's believed the waiver program to be invalid when it terminated Kirkingburg or that it relied upon any such belief as a basis for its refusal to accept the FHWA waiver, we need not decide whether such a belief would shield it from liability, or whether it might instead have been required to challenge the validity of the waiver program in an administrative proceeding. We leave these questions to the district court should they become relevant on remand. We emphasize that because we are reviewing a summary judgment motion, we do not finally resolve any issues that may be dependent on the introduction of further admissible evidence at trial.

In any event, the D.C. Circuit invalidated the waiver program in 1994 not because it was inconsistent with public safety, but because the FHWA instituted the program without complying adequately with administrative procedures. See *Advocates*, 28 F.3d at 1294. When the case was remanded to the FHWA for further consideration after the court's decision, the agency conducted the appropriate notice and comment procedures and once again concluded that the waiver program was a desirable measure in light of both safety concerns and the goals of the ADA. No challenge has been made to that decision, and the statutory provision allowing the FHWA to grant waivers to vision-impaired drivers remains in effect. 49 U.S.C. § 31136(e)(1). In fact,

last year, the FHWA granted at least one waiver to a monocular-visioned driver. 62 Fed. Reg. 35,881 (1997). Thus, we reject Albertson's argument that the waiver program is not a lawful and legitimate part of the DOT regulatory scheme.⁸

(ii) Direct Safety Threat

Alternatively, Albertson's maintains that its independent adoption of the regular DOT vision standards without the waiver provision, as a job-related requirement, is consistent with the ADA. It asserts that requiring compliance with the regular DOT vision standards is necessary to prevent visually-impaired employees from "pos[ing] a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). In other words, it argues that recognizing the FHWA waivers would constitute a direct safety hazard.

The practical effect of Albertson's argument is to seek to have us declare the waiver program invalid. We seriously question our jurisdiction to do so in the context of these proceedings. We doubt that a business that operates in the highly regulated commercial transportation industry is free to challenge generally applicable FHWA regulations in private litigation. In particular, our concern is that allowing such a challenge would effectively permit a regulated entity to circumvent the specific scheme for judicial review of FHWA

⁸ The dissent asserts that the waiver program is not part of the regulatory scheme. That is not correct. The statute governing the DOT safety standards specifically includes a provision allowing for waivers of the regular standards and we consider the "scheme" to include all the relevant rules, regulations, and statutory provisions.

regulations that Congress carefully established in the Administrative Orders Review Act (commonly known as the Hobbs Act).⁹ 28 U.S.C. §§ 2321, 2342. Because the parties have not addressed this question, however, we will not decide it here, leaving it to the district court to do so initially, should further proceedings following remand make such a determination appropriate or necessary.

[13] In any event, Albertson's has simply failed to produce any evidence that Kirkingburg and other waiver recipients pose a direct safety threat. Under the statute, a direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* at § 12111(3). A "significant risk" means a high probability of harm that is neither remote nor speculative. 29 C.F.R. § 1630.2(j). Drivers who qualify for the waiver program have necessarily established to the satisfaction of the agency charged with ensuring highway safety that they do not pose a safety threat at all.¹⁰ Denying a

⁹ The Hobbs Act governs judicial review of rules, regulations, and final orders of a handful of agencies, including the Interstate Commerce Commission, under which authority the FHWA acts. For a discussion of the Hobbs Act and its purposes, see *Carpenter v. Department of Transportation*, 13 F.3d 313 (9th Cir. 1994). *Carpenter*, a pre-waiver program case, involved a driver with monocular vision who had been disqualified from driving when the FHWA found that he did not meet the applicable vision standards. The driver brought an action in federal district court, claiming that the regulations violated his civil rights. We dismissed the claim, finding that the Hobbs Act "requires that such a challenge be brought only in the court of appeals." *Id.* at 314.

¹⁰ It bears mentioning once again that, prior to offering Kirkingburg a job, Albertson's gave him a 16-mile road test. He performed well on the test and demonstrated to Albertson's transportation manager that he had "superior driving skill to operate safely the type of

monocular-visioned driver the opportunity to work, in spite of his having demonstrated that he is capable of performing the job safely, is precisely the sort of unwarranted discrimination that the ADA sought to abolish.

[14] To the extent that Albertson's contends that DOT vision requirements governing the qualifications of truck drivers constitute a floor, not a ceiling, and that it is free to adopt more restrictive standards than are set forth in the regulations, it misperceives the nature and purpose of the FHWA waiver program. The waiver program was designed to bring the DOT regulations into compliance with the requirements of the ADA and serves to protect disabled persons against unfounded discrimination. More important for our purposes, however, the individuals who secure waivers under the program have been determined to be safe drivers. It is evident, therefore, that however one views the other parts of the DOT regulations, the waiver program does not provide a floor for employers; rather it precludes them from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver are incapable of performing that job by virtue of their disability.¹¹

commercial vehicles listed above." In fact, the record as a whole demonstrates clearly, and without a hint of any contrary evidence (other than the fact of his monocular vision), that Kirkingburg is eminently qualified for the job of commercial truck driver.

¹¹ Albertson's does not contend that it is entitled to adopt vision standards that are more stringent than those contained in the federal regulations, including the waiver program, because the work its drivers perform is substantially different from the work performed by other commercial truck driver. We express no view as to how such an argument would fare in a case in which it was properly presented.

Albertson's may, in other respects, be able to adhere to stricter standards than those contained in federal regulations. But when the stricter standards it adopts screen out people with disabilities in contravention of a federal program designed both to protect the public safety and ensure compliance with the ADA, it will not be able to avoid the Act's strictures by showing that its standards are necessary to prevent a direct safety threat. To put it another way, the FHWA has already determined that the regular DOT vision standards, if applied across the board, would unnecessarily discriminate against visually impaired drivers in violation of the ADA. It has also determined that some visually impaired drivers who cannot meet the regular standards are nevertheless safe, competent drivers. In light of the agency's determination that waiver recipients do not pose a threat to public safety, we conclude that Albertson's is precluded from asserting that they do.

CONCLUSION

In short, we conclude that if the facts are as Kirkingburg alleges, he suffers from a disability and is therefore protected by the provisions of the ADA. We further conclude that in establishing its job-related prerequisites, Albertson's cannot selectively adopt and reject federal safety regulations when the effect of its selective adoption and rejection is to discriminate against truck drivers with disabilities. Albertson's job requirement, which screens out otherwise qualified individuals with disabilities, is invalid.

Because Kirkingburg's failure to satisfy the discriminatory prerequisite served as the sole basis for the granting of summary judgment in favor of Albertson's, we reverse the district court's award and remand for further

proceedings.

REVERSED and REMANDED.

RYMER, Circuit Judge, dissenting:

The majority subjects Albertson's to liability under the ADA for requiring a commercial truck driver to comply with the visual acuity regulations of the Department of Transportation as an essential function of his job rather than letting him participate in an experimental program that waived those requirements but had not been found safe. I must dissent.

Complying with current DOT safety requirements was an essential function of Kirkingburg's job at Albertson's.¹² There is no dispute that his eyesight didn't meet them. He could not be certified. But several months before he lost his certification, the FHWA decided to select a group of experienced monocular drivers with clean safety records to be licensed for a three year study of the relationship between visual disorders and commercial motor vehicle safety. Kirkingburg says that he could have performed the essential functions of his job by virtue of a waiver, and that in any event, his disability should have been

¹² Kirkingburg contends that the essential function of his job was being certified by DOT, not being in compliance with its regulations. However, there is no evidence that Albertson's ever accepted a waiver or defined the essential function of driving its commercial vehicles as anything less than complying with DOT visual acuity standards.

accommodated by allowing him a leave of absence to get one.

The problem is that DOT vision regulations were adopted for public safety. The version in effect in November 1992, when Kirkingburg failed to get certified, had been on the books since 1970. Although numerous studies had been conducted to determine whether vision requirements for monocular drivers could safely be changed, the FHWA found no sufficient basis for doing so as recently as July 16, 1992.¹³ See 57 Fed. Reg. 31458 (1992). That's why the FHWA decided to conduct a study to gather empirical data on monocular drivers, and to grant waivers on a limited basis to an experimental group. See *id.* Even so, the FHWA had not determined that the existing regulations could safely be waived albeit experimentally for monocular drivers. That is why the D.C. Circuit held that the waiver program itself was invalid; the agency had not made the required finding that a waiver was "consistent with the safe operation of commercial motor vehicles" as required by statute. *Advocates for Highway and Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288, 1289 (D.C. Cir. 1994).

Neither Kirkingburg nor the majority explains why the ADA should force Albertson's to assume the risk of waiving vision requirements that the FHWA itself had not found could be safely waived. Instead, the majority says that because the FHWA determined in 1994 that the vision study was safe enough to continue, Albertson's cannot say that in 1992 its requirement of complying with the vision regulations and rejecting a waiver was justified on account of safety. But

¹³ See *Rauenhorst v. Department of Transp.*, 95 F.3d 715 (8th Cir. 1996) (outlining history).

the syllogism is flawed:

1. The majority starts with the premise that the dispositive question is "whether Albertson's job-related requirement that Kirkingburg fails to meet is lawful as applied." Whatever this means in the context of the ADA (where the real question is whether the employee is a "qualified individual with a disability who, with or without accommodation, can perform the essential functions of the employment position," 42 U.S.C. § 12111(8)), it cannot be the case that requiring compliance with DOT safety regulations is unlawful. Nor can it become unlawful "as applied" when the alternative is a waiver available only to an experimental group of drivers in a study that no one had found was consistent with the safe operation of commercial motor vehicles.

2. Next, the majority asserts that Albertson's has not "simply conformed its job requirements to the relevant DOT regulations; rather, it has chosen to adhere to only a part of the regulations, while ignoring the waiver program." However, Albertson's did not pick and choose regulations: the regulations hadn't changed in November of 1992 (and still haven't). It conformed its conduct precisely to the regulations in effect. The vision study waiver program was not part of the regulations, nor was it "a portion of the federal scheme" to prevent discrimination that Albertson's impermissibly rejected, as the majority suggests. Rather, the vision study waiver program was part of the FHWA's "efforts to review, and to eventually amend, its vision requirements through a rulemaking action." 57 Fed. Reg. 31458, 31458 (1992). As the agency explained,

the waiver program will enable the FHWA to

conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the current Federal vision requirements. This study will provide the empirical data necessary to evaluate the relationships between specific visual deficiencies and the operation of CMVs. The data will permit the FHWA to properly evaluate its current vision requirement in the context of actual driver performance, and, if necessary, establish a new vision requirement which is safe, fair, and rationally related to the latest medical knowledge and highway technology.

Id. In short, the vision waiver study was not a rule or a regulation with the force of law. It was a test, and an invalid test at that (as the D.C. Circuit held), for no determination had been made that waiving the vision requirements would not adversely affect the safe operation of commercial vehicles.

3. Next, the majority says that the waiver program "has been adjudged a success by the FHWA." Whether that's so or not, the determination referred to is the FHWA's "Notice of Final Determination and change in research plan" issued November 17, 1994 -- two years after Kirkingburg lost his job. 59 Fed. Reg. 59386, 59389 (1994). But it doesn't matter what the FHWA *now* thinks about the safety of its waiver study program. Whatever it had learned as a result of two years worth of the experiment wasn't known to Albertson's in November 1992, or to the agency at the time of the study was begun in July 1992. As Kirkingburg seeks damages for his November 1992

termination, not reinstatement, the 1994, post-*Advocates* determination is simply irrelevant.

4. Finally, having said that Albertson's adhered to only part of the regulations because it ignored the waiver program, and that the waiver program is a success, the majority concludes that the waiver program "is a lawful and legitimate part of the DOT regulatory scheme" which Albertson's cannot say was not safe. Thus it holds that Albertson's "cannot selectively adopt and reject federal safety regulations" in establishing its job-related prerequisites, and that its job requirement is invalid. But since the vision study waiver program never was (and still isn't) a part of the regulations: and since it wasn't a success at the time of Kirkingburg's termination because it hadn't gotten off the ground and wasn't determined to be safe; and since it never was (and still isn't) a part of any regulatory scheme, there is no basis for holding that Albertson's job requirement is invalid. Nor is there any authority for estopping Albertson's, which is a private employer with legal responsibility to the public for the safety of its commercial motor vehicle drivers, from asserting that it wasn't required to accept a waiver, or that it wasn't reasonable for it to decline to do so, on the grounds of safety. To me it is dispositive that at the time of Kirkingburg's termination (and in this record), no one (including the FHWA) had determined that a waiver was safe.

For these reasons, I agree with the district court that Kirkingburg failed to show that he could perform the essential functions of his job because he did not meet the DOT visual requirements, and that the ADA does not require Albertson's to accept an experimental waiver that the FHWA had not found consistent with the safe operation of

commercial motor vehicles. Since Albertson's offered to accommodate Kirkingburg's disability by another job (which Kirkingburg rejected), it fulfilled its ADA obligations. I would, therefore, affirm.

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HALLIE KIRKINGBURG,	)	No. 96-35002
)	
Plaintiff-Appellant,	)	D.C. No.95-549-PA
v.)	
	)	ORDER
ALBERTSON'S, INC.,	)	Filed July 8, 1998
)	
Defendant-Appellee.)	
_____)	

Before: GOODWIN, REINHARDT, and RYMER,
Circuit Judges.

Judges Goodwin and Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Rymer voted to grant the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

HALLIE KIRKINGBURG,)	
)	
Plaintiff,	)	CV 95-549-PA
v.)	
)	OPINION
)	Filed Oct. 25, 1995
ALBERTSONS, INC., a Delaware)	
corporation,)	
Defendant.)	

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PANNER, J.

Plaintiff Hallie Kirkingburg brings this action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, against his former employer, defendant Albertson's, Inc. Plaintiff, who worked as a truck driver, alleges that defendant illegally terminated him because he is almost blind in one eye.

Defendant moves for summary judgment. I grant the motion.

BACKGROUND

Since childhood plaintiff has had amblyopia in his left eye, "an impairment of vision without detectable organic lesion." Roth v. Lutheran General Hospital, 57 F.3d 1446, 1449 n.3 (7th Cir. 1995). The condition, which cannot be corrected, leaves plaintiff almost blind in his left eye.

Plaintiff became a commercial truck driver in 1979. Defendant hired him in August 1990. Plaintiff has had a clean driving record.

The United States Department of Transportation (DOT) regulations require that interstate commercial truck drivers have "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses" 49 C.F.R. § 391.41(b)(10). Plaintiff has never met this vision standard, but managed to obtain DOT certification anyway. One physician certified plaintiff "[b]ecause he had been

driving for many years with this type of vision without any apparent problems." Tom Affidavit, Exh. E, at 16 (Sayler Depo. at 10).

In 1991, plaintiff injured his head when he fell from a truck. When plaintiff was released to work in November 1992, defendant ordered him to undergo a medical examination. On November 6, 1992, Dr. Douglas reported that plaintiff did not meet DOT vision standards.

On November 20, 1992, defendant fired plaintiff. According to Frank Riddle, a manager for defendant, "[w]e felt it was a matter of safety. We were solely concerned about the safe operation of our vehicles." Plaintiff's Concise Statement at 84 (Riddle Depo. at 13).

Plaintiff applied for a "vision waiver" from the Federal Highway Administration (FHWA), which would give him DOT certification despite his amblyopia. The FHWA started the vision waiver program in 1992, partly because of the national policy "'to facilitate the employment of qualified individuals with disabilities.'" Advocates for Highway and Auto Safety v. Federal Highway Admin., 28 F.3d 1288, 1290 (D.C. Cir. 1994) (quoting 57 Fed. Reg. 31,458, 31,459 (1992)). Applicants needed a valid commercial license and three years' recent experience driving a commercial vehicle without moving violation citations, license suspensions, or driving-related convictions. Id. at 1290-91.

Plaintiff had the requisite clean driving record. He also had a letter from an optometrist, Beatrice Michel, stating that his vision had "not worsened since his last vision examination and is not expected to change in the future." Plaintiff's Concise Statement at 137. Dr. Michel concluded,

"As a licensed doctor of optometry, my opinion is that Mr. Kirkingburg can easily perform the driving tasks required. He has normal visual acuity (20/20) in the right eye, and the amblyopia in the left eye will not interfere with his ability to drive." Id. Plaintiff received a vision waiver in early 1993, but defendant refused to accept it.

In August 1994, the United States Court of Appeals for the District of Columbia Circuit struck down the vision waiver program, holding that the FHWA had not shown empirical evidence that the waivers were "consistent with the safe operation of commercial motor vehicles." Advocates for Highway and Auto Safety, 28 F.3d at 1293 (quoting former 49 U.S.C. app. § 2505(f), now codified at 49 U.S.C. § 31136(e)). Because the waiver program was a "significant departure" from the FHWA's previous vision standards, the agency had a special burden to justify it. Id.

In November 1994, the FHWA determined that it would continue vision waivers for the approximately 3,000 drivers in the program, including plaintiff, until March 31, 1996. 59 Fed. Reg. 59,386, 59,387 (1994). The FHWA noted that the fatal accident rate for waived drivers was higher than for other drivers, but considered that unimportant because fatal accidents were rare and the waived drivers involved had not been found to be at fault by the reporting police officers. The agency conceded that information produced by the vision waiver program "will never answer the question as to what the standards should be," and concluded that "[t]he vision standard found at 49 CFR § 391.41(b) (10) will remain in effect until the completion of [future] research and the implementation of any new standard." Id. at 59,389-90.

STANDARDS

The court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex Corp v. Catrett, 477 U.S. 317, 322-23 (1986).

The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The court should resolve reasonable doubts about the existence of an issue of material fact against the moving party. Id. at 631. The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. Id. at 630-31.

DISCUSSION

The ADA prohibits covered employers from discriminating against qualified individuals with disabilities. 42 U.S.C. § 12112(a). To make a prima facie case under the ADA, plaintiff must show that (1) he is a disabled individual; (2) he is qualified, that is, he can perform the essential functions of the job with or without reasonable accommodation; and (3) defendant terminated him because of his disability. Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996 (D. Or. 1994); White v. York Int'l Corp., 45 F.2d 357, 360-61 (10th Cir. 1995); see also Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990) (elements of prima facie case under Rehabilitation Act).

Defendant contends that as a matter of law plaintiff was not a qualified individual. A "qualified individual with a disability" "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court should consider the employer's judgment on which job functions are essential. Id.

In deciding whether plaintiff was a qualified individual, the court must first "determine whether [plaintiff] could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue." Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, 114 S. Ct. 1386 (1994). If plaintiff cannot perform the essential functions of the job, the court must then determine "whether any reasonable accommodation by the employer would enable [plaintiff] to perform these functions." Id. at 1394.

Defendant argues that because plaintiff did not meet the DOT vision standards, he could not perform an essential function of his job. I agree with defendant that it properly considered meeting DOT minimum requirements essential to plaintiff's job.

Plaintiff argues that defendant should have reasonably accommodated him by granting him a leave of absence to obtain a vision waiver. However, the ADA does not obligate defendant to employ truck drivers who have received vision waivers. The vision waiver program is a flawed experiment that has not altered the DOT vision requirements.

No reasonable accommodation is possible. "An

employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Schmidt, 864 F. Supp. at 997; Buck v. United States Dep't of Transportation, 56 F.3d 1406, 1408 (D.C. Cir. 1995) (Rehabilitation Act did not require FHWA to perform individual assessments of truck drivers who failed DOT hearing requirements). If plaintiff were ever involved in an accident, defendant would have difficulty explaining why it hired a driver who could not meet DOT vision requirements. Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993) ("Woe unto the employer who put such an employee behind the wheel"; driver who failed DOT vision standards presented "genuine substantial risk that he could injure himself or others" (quoting Collier v. City of Dallas, No. 86-1010, 798 F.2d 1410, slip op. at 3 (5th Cir. Aug. 19, 1986) (unpublished)), cert. denied, 114 S. Ct. 1386 (1994)).

Plaintiff argues that defendant's policy of rejecting all vision waivers violates the need for individual assessments under the ADA. See Sarsycki v. United Parcel Service, 862 F. Supp. 336, 341 (W.D. Okla. 1994) (ADA requires employer to make individualized assessment); 59 Fed. Reg. 50,887, 50,888 (1994) (FHWA stated that "a preferable standard [to the absolute 20/40 requirement] would allow drivers to demonstrate their individual ability to drive safely, in spite of their vision deficiency."). As plaintiff points out, his driving record is clean and an optometrist has attested that his vision is adequate. However, I conclude that defendant may rely on the DOT vision standards and need not make an individual assessment of plaintiff's ability to drive. See Buck, 56 F.3d at 1408-09 (DOT deafness standards) and Ward v. Skinner, 943 F.2d 157, 161-64 (1st Cir. 1991) (DOT

epilepsy standards), cert. denied, 503 U.S. 959 (1992).

CONCLUSION

Defendant's motion for summary judgment (#24) is granted .

DATED this 25th day of October, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,)	
)	
Plaintiff,	)	CV 95-549-PA
v.)	
	)	ORDER
	)	Filed Nov. 9, 1995
ALBERTSONS, INC., a Delaware)	
corporation,)	
Defendant.)	

PANNER, J.

Plaintiff Hallie Kirkingburg brings this action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, against his former employer, defendant Albertson's, Inc. Plaintiff alleges that he was a truck driver for defendant and that defendant terminated him because he has 20/200 vision in his left eye.

I granted defendant's motion for summary judgment. Plaintiff now moves for reconsideration, arguing that I should have determined whether reassigning plaintiff to a yard hostler position could have been a reasonable accommodation under the ADA. I deny the motion to reconsider.

Neither party cited controlling Ninth Circuit authority on whether an employer's duty to provide reasonable accommodation includes finding the disabled employee an alternative job. Cf. Buckingham v. United States, 998 F.2d

735, 740 (9th Cir. 1993) (under Rehabilitation Act, reasonable accommodation may include transfer to same position in different location). For this motion, I will assume that reassigning plaintiff to a vacant position is a possible reasonable accommodation. See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); but see Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) ("the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position"). However, plaintiff has not shown that the yard hostler position was vacant when he was terminated. Even if the yard hostler position was vacant, driving was an essential function of the job. "An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Schmidt v. Safeway, Inc., 864 F. Supp. 991, 997 (D. Or. 1994); see also Marschand v. Norfolk and Western Ry. Co., 876 F. Supp. 1528, 1543 (D. Ind. 1995) (employer not required to reassign disabled employee to vacant position unless employee is qualified for position).

CONCLUSION

Plaintiff's motion for reconsideration (#50) is denied.

IT IS SO ORDERED.

DATED this 9th day of November, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,)	
)	
Plaintiff,	)	CV 95-549-PA
v.)	
	)	JUDGMENT OF
ALBERTSONS, INC., a Delaware	)	DISMISSAL
corporation,	)	Filed Dec. 15, 1995
Defendant.)	

Judgment is for defendant. This action is dismissed.

DATED this 15th day of December, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

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FILED

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No. 98-591

~~OFFICE OF THE CLERK~~
SUPREME COURT, U.S.

In The

Supreme Court of The United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

**I. The Petition For Writ Of Certiorari
Should Be Denied Because The Court Of
Appeals' Decision Was Not Erroneous And
There Is No Split Among The Circuit
Courts Regarding The Issues Presented.**

**A. Petitioner Relies Upon A
Mischaracterization Of The Record
To Support Its Arguments.**

Petitioner asserts that the Ninth Circuit wrongly relied upon evidence not in the record in ruling that there was a genuine issue of material fact regarding whether Respondent was a qualified individual with a disability under the Americans With Disabilities Act (ADA). 42 U.S.C. § 12112(a) (1994). Petitioner's assertion is simply wrong.

The Ninth Circuit stated:

Kirkingburg has presented uncontroverted evidence showing that he suffers from amblyopia, a condition resulting in his being almost totally blind in his left eye. In short, he has monocular vision. Given the nature of the condition and its permanence, there is no question that Kirkingburg is substantially limited in the major life activity of seeing. Kirkingburg's inability to see out one eye affects his peripheral vision and

his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see. To put it in its simplest terms, Kirkingburg sees using only one eye; most people see using two. Accordingly, under the statute and implementing regulations, if the facts are as Kirkingburg alleges, he is disabled. *Kirkingburg v. Albertsons*, 143 F.3d 1228 (9th Cir. 1998) (App. to Pet. for Cert., at 14a-15a).

The uncontroverted evidence the court referred to was provided, in part, in material submitted as part of Plaintiff's Motion to Submit Additional Materials In Opposition to Defendant's Motion for Summary Judgment. CR 45, 47; Excerpts of Record, pp. 187-210. That material included deposition testimony from Ms. Beatrice Michel, O.D., Respondent's treating doctor of optometry. Dr. Michel testified in part to the following:

Q. Do you have any medical opinion whether Hallie Kirkingburg would be a better or worse driver than someone with good binocular vision under the conditions I previously asked you about, over the road, interstate driving with a couple of trailers?

A. Well, if that is the only basis of judgment, I would say he would be equally competent because, again, this has been a lifelong condition. He has made adaptations and adjustments which work very well for him, and I don't think that he, on the basis of vision alone, would be better or worse than someone with binocular vision.

Q. What adaptations and compensations has Mr. Kirkingburg personally made on the basis of his eye long vision -- or his lifelong vision?

A. Well, if someone is newly --

Q. Not someone. I'm asking you about your patient, Hallie Kirkingburg, that you personally know as his physician, what adjustments or adaptations he personally has made, not what someone you imagine would have done with his vision.

A. I see. Mr. Kirkingburg, having had this condition since childhood, has not had binocular vision since childhood, and given that, has always functioned as a one-eyed person and has always relied on monocular cues.

The reason why this is sufficient, this is different for a person who is newly one eyed. For a person newly one eyed who has relied generally on two-eyed vision, much

more adaptation is required because this is a new way of vision for them. They have to compensate in ways that Hallie has learned as a child.

Given Dr. Michel's testimony Petitioner's assertion that there is no evidence in the record to support the Court of Appeals' ruling is simply untenable.

B. There Is No Split Among The Circuits. The Only Other Circuit To Address The Issue Of Whether An Individual With Monocular Vision Is Disabled Due To The Manner In Which He Or She Sees Held The Same As The Ninth Circuit In The Present Case.

Petitioner attempts to create a split among the Circuits where there is none, by arguing that the decision in *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (Jan. 12, 1998), conflicts with the decision in *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1991). Respondent's attempt fails because, as the Ninth Circuit explained in commenting on *Still*, *supra*, "Notably, the *Still* court did not cite or discuss 29 C.F.R. § 1630.2(j)(1)(ii) in reaching its decision. Accordingly, we agree with the Eighth Circuit's analysis and reject the Fifth Circuit's." *Kirkingburg, supra*, at fn. 4 (App. to Pet. For Cert. at 15a) (emphasis added).

It is the application of 29 C.F.R. § 1630.2(j)(1)(ii), to which Respondent objects. Under that regulation the manner under which an individual can perform a particular major life activity is relevant to the analysis of whether the individual is disabled under the ADA. The *Doane* court applied that regulation in its analysis of whether a monocular vision police officer was disabled and held that he was. The *Still* court did not apply the regulation in question and indeed did not address the applicability of the regulation to its analysis. In *Kirkingburg* the Ninth Circuit applied the regulation in its analysis, held Respondent was disabled, and explained its holding was consistent with *Doane*. Thus, there is no conflict among the Circuits. The Eighth and Ninth Circuits are the only circuits that have addressed the issue and they are consistent between themselves. The Fifth Circuit's ruling in *Still* is not in conflict with *Doane* and the present case. It is simply distinguishable.

C. The Court of Appeals Decision Is Not Erroneous. Respondent's Restated Argument That It Can Selectively Adopt And Reject Parts Of The Federal Regulatory Scheme Was Properly Rejected By The Court of Appeals And Does Not Warrant This Court's Review.

While reformulating its argument to the Court of Appeals, Respondent strains to make the status of the DOT waiver program a significant issue warranting this Court's review. Respondent argues that the waiver program was not part of the federal

"regulations in 1992." Pet. for Cert. at 17.

However, this is simply a matter of semantics.

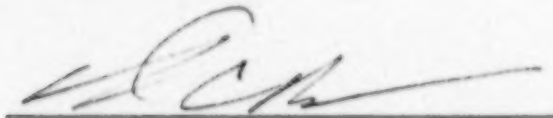
As the Ninth Circuit repeatedly explained, the DOT waiver program is part of the "regulatory scheme." *E.g., Kirkingburg, supra*, fn. 8 (App. to Pet. for Cert. at 24a). "The statute governing DOT safety regulations specifically includes a provision for allowing waiver of the regular standards and we consider the 'scheme' to include all the relevant rules, regulations and statutory provisions." *Id.*; accord *Rauenhorst v. U.S. Department of Transp.*, 95 F.3d 715, 716-718 (8th Cir. 1996), *citing in part*, 49 U.S.C. § 31136(e). In addition, in connection with passage of the ADA, Congress directed the DOT to make the necessary changes to its regulations in order to end unwarranted discrimination against the disabled. *Rauenhorst, supra*, at 717. The waiver program in question was the DOT's attempt to bring its regulations into compliance with the ADA. *Id.*; accord, *Kirkingburg, supra* (App. to Pet. for Cert. at 20a). The Ninth Circuit correctly rejected Respondent's argument that it should be allowed to select which parts of the DOT regulatory scheme it would accept or reject, especially since here Respondent was rejecting those DOT rules and regulations intended to avoid systematic discrimination against the disabled. That holding was a proper interpretation of federal law. Therefore, there is no need to review that holding.

II. Conclusion.

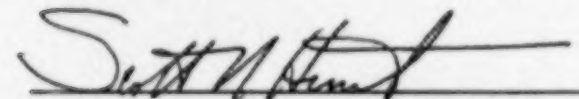
For the foregoing reasons this Court should deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED this 6th day of November, 1998.

Respectfully submitted,



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(5)
No. 98-591

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In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

REPLY TO BRIEF OPPOSITION

I. Petitioner Does Not Rely on a Mischaracterization of the Record in Support of its Arguments.

Respondent relies on the deposition testimony of Ms. Beatrice Michel, O.D. for the contention that Petitioner was incorrect in its characterization of the record before the Ninth Circuit. Ms. Michel's deposition testimony does not affect Petitioner's assertion that the Ninth Circuit, in reaching its decision, relied upon evidence that was not in the record.

By Respondent's own admission, Dr. Michel is Respondent's "treating doctor of optometry." (Brief in Opposition, pg. 2). Additionally, in Dr. Michel's deposition, she testified that she was not an expert in the area of cues upon which people rely for distance depth perception. (Appellant's Excerpts of Record, p. 204) ("Again, I'm not the expert in this area per se."). Thus, Respondent would be hard-pressed to deny that Dr. Michel was testifying at her deposition as Mr. Kirkingburg's "treating" doctor, not as an expert. In light of this distinction, Petitioner directs the Court's attention to the following excerpt of Dr. Michel's

deposition testimony (which appears directly following the testimony cited by Respondent):

- Q. I understand the answer you're giving me, but my question to you is, are you making assumptions because Mr. Kirkingburg has been monocular since birth as opposed to having run some specific tests or made some specific observations on him that tells you that he's functioning that way today because he's monocular since birth, or is this something that you generally believe to be true?
- A. I generally believe this to be true.

(Appellant's Excerpts of Record, p. 209).

Because Dr. Michel was not testifying as an expert, Respondent cannot rely on Dr. Michel's testimony regarding things she "believes to be true" as proper evidence upon which the Ninth Circuit relied to reach either its holding that the *manner* in which Respondent sees differs from the *manner* in which most others see or its holding that Respondent has personally compensated either in regards to depth perception or peripheral vision. (App. to Pet. for Cert., at 14a). Dr. Michel testified that she did not perform any tests that would have enabled her to make such conclusions and expressly stated that her conclusion as to how her patient functioned visually was a general belief.

The Ninth Circuit relied on facts that were not in the record before it when it reached its conclusion that Respondent had "developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability." (App. to Pet. for Cert., 14a).

CONCLUSION

Respondent's Brief in Opposition does not diminish the grave importance of Petitioner's Questions Presented and the need for review by this Court.¹ Petitioner respectfully requests this Court to grant its Petition for a Writ of Certiorari.

Rule 29.1 Listing

As previously stated on p. ii of its Petition for a Writ of Certiorari, Albertsons, Inc. has no parent companies nor nonwholly owned subsidiaries.

Respectfully Submitted.

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¹ Other issues raised in Respondent's Brief in Opposition are addressed by Petitioner in its Petition for a Writ of Certiorari.

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No. 98-591

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ALBERTSONS, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE OF
UNITED PARCEL SERVICE OF AMERICA, INC.,
IN SUPPORT OF CERTIORARI**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-591

ALBERTSONS, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**MOTION OF UNITED PARCEL SERVICE
OF AMERICA, INC., FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF CERTIORARI**

Pursuant to this Court's Rule 37.2, United Parcel Service of America, Inc. (UPS) respectfully moves for leave to file the attached brief *amicus curiae* in this case. Petitioner has consented to the filing of this brief, but respondent has declined to do so.

UPS is one of the largest employers in the United States, with nearly 300,000 employees in all 50 states and every territory. Because of the size and scope of its workforce, UPS has faced the difficult issue of application of the Americans with Disabilities Act (ADA) in almost every employment context. Consistent application of the ADA has now been made virtually impossible based on the conflicts among the circuits on a critical threshold issue, the definition of a disability. Because it

operates in every jurisdiction and venue in this nation, UPS is vitally concerned with the development of this new federal statute and with the adoption of uniform approaches to its application. Moreover, UPS often speaks out on issues of concern to American employers before Congress, regulatory agencies, and the federal courts. In this case, UPS is well-situated to present the perspective of large American employers regarding employment law issues.

UPS has a specific interest in the interpretation of the ADA announced by the Ninth Circuit in this case. In particular, UPS is the defendant in a nationwide lawsuit brought by the Equal Employment Opportunity Commission (EEOC) on the issue of monocular vision under the ADA, *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.). Moreover, UPS has opposed interpretations of the ADA similar to those adopted by the Ninth Circuit in this case in both the Tenth and First Circuits. UPS was the prevailing party in a Tenth Circuit ADA case currently pending before this Court, *Murphy v. United Parcel Service*, No. 97-1992 (filed June 9, 1998), which presents the question whether an individual's ability to mitigate the effects of an impairment demonstrates that the individual does not suffer from a "disability" within the meaning of the ADA. At the same time, UPS is subject to a First Circuit decision that is diametrically opposed to *Murphy*. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998).

The legal question presented in this case arises with great frequency in ADA cases in a wide variety of circumstances, and its resolution will have a major impact on the ultimate scope of the obligations and burdens imposed on UPS and other American businesses by the ADA.

For all these reasons, UPS has a substantial interest in the questions presented in this case, which include (a) whether monocular vision constitutes a disability under

the ADA, and (b) the legal significance of an impaired individual's ability to compensate for or mitigate the effects of the impairment. While the latter question is not separately identified as such in the petition, it was expressly addressed and resolved by the court of appeals in this case and, because it is an integral element of the entire disability determination, it is fairly encompassed within the questions presented in the petition. Accordingly, UPS seeks leave to file this *amicus* brief supporting certiorari in order to bring to the Court's attention the full scope and importance of the questions presented herein and the compelling need for this Court's intervention to bring clarity and resolution to this confused area of the law.

Respectfully submitted.

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QUESTION PRESENTED

This case presents the question whether the court of appeals erred in holding that monocular vision constitutes a "disability" under the Americans with Disabilities Act (ADA). Fairly encompassed within that question are two related (and extremely important) issues, namely, (a) whether the court of appeals erred in resting its disability determination on the premise that an impaired individual's ability to compensate for or mitigate the effects of an impairment constitutes proof of disability, and (b) whether the court of appeals erred in holding that an employer's mere recognition of an employee's impairment renders the employee disabled within the meaning of the ADA.

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BRIEF *AMICUS CURIAE* OF UNITED PARCEL SERVICE OF AMERICA, INC., IN SUPPORT OF CERTIORARI

United Parcel Service of America, Inc. (UPS) respectfully submits this *amicus curiae* brief in support of certiorari on the question whether monocular vision constitutes a "disability" under the Americans with Disabilities Act (ADA), a question that necessarily encompasses the subsidiary issue of the legal significance, for purposes of disability determinations under the ADA, of an individual's ability to mitigate or compensate for an impairment.¹ UPS believes that this is an issue of national importance to all workers and employers.

INTEREST OF *AMICUS CURIAE*

UPS is one of the largest employers in the United States, with nearly 300,000 employees in all 50 states and every territory. Because of the size and scope of its workforce, UPS has faced the difficult issue of application of the Americans with Disabilities Act (ADA) in almost every employment context. Consistent application of the ADA has now been made virtually impossible based on the conflicts among the circuits on a critical threshold issue, the definition of a disability. Because it operates in every jurisdiction and venue in this nation, UPS is vitally concerned with the development of this new federal statute and with the adoption of uniform ap-

¹ Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

proaches to its application. Moreover, UPS often speaks out on issues of concern to American employers before Congress, regulatory agencies, and the federal courts. In this case, UPS is well-situated to present the perspective of large American employers regarding employment law issues.

UPS has a specific interest in the interpretation of the ADA announced by the Ninth Circuit in this case. In particular, UPS is the defendant in a nationwide lawsuit brought by the Equal Employment Opportunity Commission (EEOC) on the issue of monocular vision under the ADA, *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.). Moreover, UPS has opposed interpretations of the ADA similar to those adopted by the Ninth Circuit in this case in both the Tenth and First Circuits. UPS was the prevailing party in a Tenth Circuit ADA case currently pending before this Court, *Murphy v. United Parcel Service*, No. 97-1992 (filed June 9, 1998), which presents the question whether an individual's ability to mitigate the effects of an impairment demonstrates that the individual does not suffer from a "disability" within the meaning of the ADA. At the same time, UPS is subject to a First Circuit decision that is diametrically opposed to *Murphy*. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998).

The legal question presented in this case arises with great frequency in ADA cases in a wide variety of circumstances, and its resolution will have a major impact on the ultimate scope of the obligations and burdens imposed on UPS and other American businesses by the ADA.

For all these reasons, UPS has a substantial interest in the questions presented in this case, which include (a) whether monocular vision constitutes a disability under the ADA, and (b) the legal significance of an impaired individual's ability to compensate for or mitigate the effects of the impairment. While the latter question is not

separately identified as such in the petition, it was expressly addressed and resolved by the court of appeals in this case and, because it is an integral element of the entire disability determination, it is fairly encompassed within the questions presented in the petition. Accordingly, UPS respectfully submits this *amicus* brief supporting certiorari in order to bring to the Court's attention the full scope and importance of the questions presented herein and the compelling need for this Court's intervention to bring clarity and resolution to this confused area of the law.

STATEMENT

1. The ADA generally prohibits employment discrimination against individuals with disabilities. Under the ADA, an individual is disabled if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The EEOC's regulations provide that an impairment is "substantially limit[ing]" if it significantly restricts the manner in which the individual can perform a major life activity. 29 C.F.R. § 1630.2(j). The EEOC also has published interpretive guidelines that purport to forbid courts from considering mitigation (*i.e.*, the ability to reduce or eliminate the negative effects of an impairment through medication, prosthetics, or other means) when making disability determinations. 29 C.F.R. pt. 1630, app. § 1630.2(j).

Only if an individual is disabled within the meaning of the ADA does the legal inquiry move to the next level -- whether the disabled individual is qualified to perform the essential functions of the job in question with or without reasonable accommodation. 42 U.S.C. § 12112. Thus, the disability determination is a crucial first step in determining the scope and coverage of the ADA.

2. Respondent Hallie Kirkingburg is nearly blind in his left eye. Respondent's former employer, petitioner Albertsons, Inc., terminated respondent's employment as

a truck driver when he failed an eye examination mandated by the United States Department of Transportation. Pet. App. 10a. Respondent later received a waiver of the vision requirement from the Department of Transportation and, when Albertsons refused to reinstate him, he sued, claiming that he was a qualified individual with a disability and a victim of intentional discrimination under the ADA. Pet. App. 11a.

The district court granted summary judgment for Albertsons. Pet. App. 35a-42a. A split Ninth Circuit panel reversed. *Id.* at 1a-33a. In an opinion by Circuit Judge Reinhardt, the majority held that respondent is disabled for purposes of the ADA because he is substantially limited in the major life activity of seeing. Pet. App. 9a, 14a. The court came to this conclusion despite its recognition that respondent has developed the ability to compensate for his impairment. *Id.* at 11a, 14a. Relying on the EEOC's regulations, the court reasoned that respondent's ability to compensate for and mitigate the effects of his monocular vision demonstrates that he suffers from a disability within the meaning of the ADA, because the "manner" in which he performs the major life activity of seeing is different from that of fully sighted persons. *Id.* at 14a-15a & n.4 (citing 29 C.F.R. § 1630.2(j)). Indeed, the court suggested that *all* persons with monocular vision necessarily suffer from a "disability" under the ADA because they see in a different "manner" than fully sighted individuals. *Id.* at 14a-15a ("[Respondent] sees using only one eye; most people see using two. Accordingly, . . . he is disabled.").

DISCUSSION

Proof that an individual suffers from a "disability" within the meaning of the ADA is a prerequisite to the applicability of the statute in most cases, and the standards governing the disability inquiry are therefore of central importance in determining the extent of the obligations and burdens imposed by the ADA. Despite the

facial clarity of the ADA's definition of "disability," however, this question continues to be heavily litigated and hotly disputed in a wide variety of contexts, and the courts of appeals have been unable to reach any consensus regarding the meaning or proper interpretation of the statutory definition. Indeed, it is fair to say that this is the ground on which most ADA litigation is fought, and that ground is currently divided among several warring camps.

In the first place, with respect to the particular impairment at issue here -- monocular vision -- the courts of appeals are divided over the question whether it constitutes a "disability" for purposes of the ADA. That circuit conflict is significant and worthy of resolution by this Court, but it is also symptomatic of a wider and more fundamental disagreement among the lower federal courts regarding the very nature of the disability determination called for under the ADA.

In the decision below, the Ninth Circuit relied on the EEOC regulations in concluding that respondent's ability to compensate for his impairment, far from providing a basis for finding that he was not disabled, instead supported the conclusion that he *was* disabled because the "manner" in which he saw was different from that of unimpaired persons. A second and related (but distinct) line of authority follows the EEOC interpretative guidelines in holding that any ability to mitigate the adverse effects of an impairment should simply be ignored for purposes of determining whether the impairment constitutes a disability. These two approaches stand the ADA on its head, requiring employers to treat as disabled those employees who can and do function equally as well as non-impaired individuals with respect to major life functions.

A third line of authority, by contrast, adheres to the plain language of the ADA and rejects the notion that courts should ignore reality in determining whether an individual suffers from an impairment that is sufficiently

severe to constitute a disability. In these jurisdictions (which include the Sixth and Tenth Circuits), an individual's ability to mitigate the effects of an impairment in the real world (e.g., by wearing glasses or a hearing aid, taking medication, and so forth) is taken into account in the disability determination.

Finally, the Fifth Circuit has recently charted yet a fourth course in this area, adopting a hybrid approach under which some types of mitigation are to be considered in making the disability determination, but others are not. This Court's review is essential to relieve employers and litigants from the impossible situation created by this jumble of inconsistent and conflicting precedents.

In purporting to express an "alternative" ground for its decision, moreover, the court below compounded the error of its disability analysis and in the process appears to have created yet another related circuit conflict. Departing from settled law in at least half-a-dozen circuits, the court seems to have suggested that an employer's mere knowledge of an individual's impairment may justify a finding of disability on the ground that the impaired individual is "regarded as" disabled within the meaning of the ADA. Any such holding would create a clear circuit conflict and would dramatically expand the scope of employer liability under the ADA in a manner that neither Congress nor any other circuit court anticipated. Further review is warranted to avoid any such distortion of the ADA.

I. The Courts Of Appeals Are Divided Over The Question Whether Monocular Vision Constitutes A "Disability" Within The Meaning Of The Americans With Disabilities Act

The court of appeals below squarely held that monocular vision constitutes a disability under the ADA. Pet. App. 14a-15a. The Eighth Circuit has reached the same result, in a case that was relied upon by the court

below. *Id.* at 15a (citing *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998)).

The Fifth Circuit, by contrast, has reached precisely the opposite result. In *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997), the court held that an individual with monocular vision was not disabled for purposes of the ADA. Rejecting the plaintiff's allegations that he was limited in the major life activities of seeing and working, the court reasoned that the realities of the plaintiff's capabilities precluded a finding of disability. The plaintiff was not substantially limited in the major life activity of seeing because, "although [plaintiff's] peripheral vision is limited by his partial blindness, [plaintiff] is able to perform normal daily activities." *Id.* at 52. Similarly, because the plaintiff's impaired vision did not significantly restrict his ability to perform either a class of jobs or a broad range of jobs, he was not substantially limited in the major life activity of working. *Id.*

Thus, monocular vision is not a disability in the Fifth Circuit, while in the Eighth and Ninth Circuits it is. This inexplicable disparity places national employers in an untenable position, forcing them to choose between three unacceptable and unworkable alternatives: (1) adopt a patchwork of inconsistent employment policies depending on the vagaries of each circuit's reading of the ADA; (2) ignore serious and important safety considerations by adopting the Eighth and Ninth Circuit's approach in all jurisdictions; or (3) continue to enforce stringent safety requirements and risk massive litigation costs in circuits that view monocular vision as a disability. The problem is exacerbated by the fact that the EEOC frequently files lawsuits which are nationwide in scope, seeking to employ the law of the circuit in which the filing occurs. Thus, for example, in *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.), the EEOC seeks to apply the extreme position adopted by the Ninth Circuit

to UPS operators throughout the country. This Court should step in to resolve the conflict among the circuits on this issue and alleviate the difficulties faced by employers attempting in good faith to comply with the potentially conflicting legal obligations imposed by the ADA, state tort law, and other regulatory regimes.

II. This Case Implicates The Widening Circuit Conflict Over The Significance, If Any, Accorded To An Impaired Individual's Mitigation Of The Impairment

Nine courts of appeals (including the court below) have now addressed the question of the legal significance of mitigation in determining whether an individual is disabled under the ADA. Those efforts have yielded widely divergent results on this frequently recurring question. Indeed, as discussed below, four different conflicting interpretations of the ADA's definition of "disability" have been adopted by these various courts, with the result that the outcome of ADA cases varies widely by jurisdiction depending on the nature of the mitigation rule that has been adopted in the relevant circuit.

A. Mitigation Is Relevant In The Ninth Circuit, But Only To Prove Disability

In this case, the court below held that respondent was disabled for purposes of the ADA at least in part because "his brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability." Pet. App. 14a. In the Ninth Circuit's view, the fact that respondent is able to compensate for his impairment supports a finding that he is disabled, because his ability to compensate for or mitigate the impairment means that "the *manner* in which he sees differs significantly from the *manner* in which most people see." *Id.* (emphasis in original); see also *id.* at 15a n.4 ("Whether an individual is disabled

within the meaning of the Act does not depend . . . on whether the individual can go about his daily business in spite of the impairment. Instead, the appropriate inquiry in cases such as this is whether, as a result of a physical impairment, the individual is required to perform a major life activity in a different manner from other persons.").

Under the Ninth Circuit's approach, therefore, an individual's ability to mitigate or compensate for an impairment such that the individual is not significantly restricted in performing a major life activity does not demonstrate the absence of disability; to the contrary, it leads to the counterintuitive conclusion that the individual *is* disabled. According to the Ninth Circuit, the very fact of mitigation supports a finding of disability because it proves that the impaired individual performs the affected major life activity in a different "manner" than unimpaired persons (even if the "disabled" individual is able to perform at the same ability level as unimpaired persons).²

² Contrary to the Ninth Circuit's standard, which presumes disability whenever the manner in which an individual performs a major life activity is not identical to the routine in the general population, the regulations promulgated under the ADA provide that an impairment substantially limits a major life activity only when an individual is "[s]ignificantly restricted as to the condition, manner or duration under which [that] individual can perform a particular major life activity as compared to . . . the average person in the general population" 29 C.F.R. § 1630.2(j)(ii) (emphasis added). As noted in the *amicus curiae* brief of the American Trucking Association in this case, the Ninth Circuit's failure to adhere to this interpretation of the ADA conflicts with the decisions of numerous other courts of appeals.

While the court below was directly concerned with a particular impairment -- monocular vision -- its holding is equally applicable to the wide array of other impairments that can be mitigated in some way, whether through medication, prosthetics, or other treatments or compensating mechanisms. Under the Ninth Circuit's approach, mitigation automatically transforms the impairment into a disability under the ADA, because mitigation by definition entails performing the affected major life activities in a manner that is (by virtue of the mitigation itself) different from the (unmitigated) manner characteristic of unimpaired persons. As a result, the Ninth Circuit's rule implicates every ADA case that requires a court to consider the relevance of mitigation to a disability determination -- in other words, every case except those rare ones in which there is nothing to be done to ameliorate the effects of an individual's impairment.

B. In The Sixth And Tenth Circuits, An Individual's Ability To Mitigate His Or Her Impairment Justifies A Finding Of No Disability

In direct contrast to the approach adopted by the court below, the Sixth and Tenth Circuits have adopted a common sense approach dictated by the plain language of the ADA. Those circuits hold that an individual's ability to mitigate his or her impairment such that the individual can perform major life activities leads to the conclusion that the individual is *not* disabled. The reasoning of these courts is straightforward and clearly correct. As the Tenth Circuit has explained, "[i]n making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures." *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *petition for cert. filed*, No. 97-1943 (June 1, 1998); *accord Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and

dissenting in part) ("[W]here an impairment is fully controlled by mitigating measures and such measures do not themselves substantially limit an individual's major life activities, I believe the ADA provides no protection."); *id.* at 768 (Guy, J., concurring in part and dissenting in part) ("[A] person with a 'controlled' medical problem or condition [who is] completely functional ... should be evaluated as such."); *Murphy v. United Parcel Service*, 141 F.3d 1185, 1998 WL 105933, at *2 (10th Cir. 1998) (unpublished opinion) (disability determinations "should take into consideration mitigating or corrective measures utilized by the individual") (quoting *Sutton*, 130 F.3d at 902), *petition for cert. filed*, No. 97-1992 (June 9, 1998).

Under the rule in the Sixth and Tenth Circuits, the fact that respondent has developed the ability to compensate for his impairment would have been taken into account as a potential basis for finding that he was not in fact disabled. In these circuits, his ability effectively to mitigate the effects of his impairment means that he is not "substantially limited" in a major life activity. In contrast, under the rule adopted by the court below, the identical fact pattern led to precisely the opposite conclusion: Respondent's ability to compensate for his impairment did not provide a basis for finding that he was *not* disabled, but instead supported the conclusion that he *was*. The conflict between these two diametrically opposed approaches to the mitigation issue is stark and unavoidable, and intervention by this Court is therefore necessary.

C. Mitigation Is Irrelevant In The First, Third, Seventh, Eighth, And Eleventh Circuits

Relying on the EEOC's interpretative guidance, several courts of appeals have adopted a third approach to the mitigation issue, holding that mitigating measures are simply irrelevant to the disability determination and must be ignored altogether. In *Doane*, for example, the

Eighth Circuit held that although "[The plaintiff's] brain has mitigated the effects of his impairment, . . . analysis of whether he is disabled does not include consideration of mitigating measures." 115 F.3d at 627. Accordingly, even though the plaintiff was able to "function normally" when his ability to mitigate was taken into account, the court nonetheless held that he was "disabled," and therefore entitled to the protection of the ADA. *Id.* at 627-28.

The First, Third, Seventh, and Eleventh Circuits have reached essentially the same conclusion. *See, e.g., Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866-67 (1st Cir. 1998) ("[T]he ADA protects Arnold from discrimination . . . without regard to whether some of his limitations are ameliorated through medication or other treatment.");³ *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997) ("[D]isabled individuals who control their disability with medication may still invoke the protections of the ADA."); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629 (7th Cir. 1998) ("We determine whether a condition constitutes an impairment, and the extent to which the impairment limits an individual's major life activities, without regard to the availability of mitigating measures . . ."); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 523 (11th Cir. 1996) (plaintiff's impairment should be evaluated "in the absence of mitigating measures").

³ To save the EEOC's ban on consideration of mitigation from some of its more patently unreasonable consequences, the First Circuit crafted what amounts to a *de minimis* exception for "simple, inexpensive [and] . . . permanent" remedies such as "eyeglasses." *See Arnold*, 136 F.3d at 866 n.10. The court offered no principled basis for the creation of this minor exception, given its reading of the statute.

Plainly, the rule followed in these circuits is at odds with *both* the decision below *and* with the approach followed in the Sixth and Tenth Circuits. Unlike the Ninth Circuit in this case, which looked to evidence of mitigation as a basis for finding a disability, and also unlike the Sixth and Tenth Circuits, which evaluate a plaintiff in his or her mitigated state, these five circuits *preclude* consideration of mitigation as part of the disability inquiry. Needless to say, the rule adopted by these five circuits leads to very different results than the rule followed in the Sixth and Tenth Circuits.⁴

D. Mitigation Is Relevant Some Of The Time In The Fifth Circuit

Finally, the Fifth Circuit has adopted yet another approach to the mitigation issue, opting to permit consideration of mitigation in some circumstances but not others. *See Washington v. HCA Health Services, Inc.*, 152 F.3d 464, 467-68 (5th Cir. 1998). After considering the terms of the ADA, the conflicting legislative history of

⁴ Perhaps less obviously, the approach followed by the First, Third, Seventh, Eighth, and Eleventh Circuits (*i.e.*, those circuits that ignore mitigation altogether) can also lead to different results than those entailed by the rule announced by the Ninth Circuit in this case. Many individuals who engage in mitigation efforts to minimize or eliminate the effect of an impairment are not severely impaired in any event, and thus might not qualify as "disabled" within the meaning of the ADA even if their mitigation efforts were ignored in making the disability determination. In the Ninth Circuit, by contrast, such individuals might be found to be disabled *by virtue of the fact that they mitigate the effects of their impairment* and thus perform a major life activity in a significantly different "manner" than unimpaired persons.

the Act, and the EEOC's interpretative guidelines, the court concluded that, "Although we think it is more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC. Thus, we will follow the EEOC Guidelines and the legislative history, but we read them narrowly." 152 F.3d at 470.

Accordingly, the *Washington* court adopted a hybrid view of the legal significance of mitigation: "[O]nly serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history -- diabetes, epilepsy, and hearing impairments -- will be considered in their unmitigated state. The impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis, that is, he must put on his pro[s]thesis every morning or take his medication with some continuing regularity." *Id.* The court also defined the sorts of mitigation that are to be taken into account: "If an individual has a permanent correction or amelioration, such as an artificial joint or a pin or a transplanted organ, that individual must be evaluated in his mitigated state." *Id.* at 470-71.

Both aspects of the Fifth Circuit's rule conflict with the approach followed below. The Fifth Circuit refuses to consider mitigation at all in some cases, whereas the decision below indicates instead that mitigation is directly relevant to the determination of the *manner* in which an individual performs major life activities. On other hand, the Fifth Circuit does consider mitigation in some instances as a basis for concluding that an impairment does *not* rise to the level of a disability, precisely the opposite purpose for which the court below considers such evidence.

E. Review By This Court Is Essential To Eliminate The Multiple Circuit Conflicts Regarding The Legal Significance Of Mitigation Under The ADA

This Court should grant the petition for certiorari in this case to resolve the four-way circuit conflict regarding the proper significance of mitigation for purposes of the disability inquiry. The courts of appeals have explicitly recognized the existence of circuit conflicts on this issue (*see, e.g.*, Pet. App. 15a n.4; *Arnold*, 136 F.3d at 866; *Washington*, 152 F.3d at 469, 471; *Gilday*, 124 F.3d at 762-63; *Baert*, 149 F.3d at 629-30; *Sutton*, 130 F.3d at 901 nn.7, 8), but have nonetheless chosen to perpetuate, and indeed exacerbate, this state of affairs, leaving employers in an impossible situation in which they are confronted with mutually inconsistent obligations and standards in different jurisdictions.

The mitigation issue was not separately identified as a distinct question in the petition filed in this case. *See* Pet. i. That fact does not militate against review of the mitigation issue here, however, because the that issue is "fairly included" within the question whether monocular vision constitutes a disability under the ADA. *See* Sup. Ct. R. 14.1(a). Indeed, resolution of the circuit conflict over the significance of mitigation evidence is a necessary first step in deciding whether monocular vision constitutes a disability because, as the opinion below reveals, respondent claims the ability to mitigate the effects of his impairment. Pet. App. 14a-15a. The court below took that fact into account and relied upon it in concluding that respondent was disabled; as discussed above, other circuits would either have ignored that fact altogether in conducting the disability inquiry or, alternatively, would have relied on that fact as a basis for concluding that respondent is *not* disabled. Thus, the first question presented in the petition squarely presents the mitigation issue that has divided the circuits.

Absent immediate intervention by this Court, the question whether a particular individual is disabled, and thus entitled to claim the protections of the ADA, will continue to depend more on where the individual lives than on the nature of the impairment at issue. Congress plainly did not intend that the ADA be given widely varying interpretations and scope in different parts of the country, but that is the present state of affairs nonetheless. Only this Court is in a position to correct this glaring problem. The courts of appeals have now had ample time to consider and implement the various possible interpretations of the ADA, and all aspects of the question have been thoroughly fleshed out in the various opinions cited above. Accordingly, there is no reason to delay consideration of this issue until a later time, as it is squarely presented in this case and cries out for prompt resolution by this Court. National employers like UPS should not continue to be forced to engage in the wasteful, expensive, and ultimately fruitless endeavor of attempting to comply with competing and mutually inconsistent interpretations of the same statute.⁵

⁵ The question of the proper legal significance to be afforded mitigation evidence is also pending before this Court in *Murphy v. UPS, Inc.*, No. 97-1992, and the Court recently invited the Solicitor General to file a brief expressing the views of the United States in that case. The Court may therefore wish to delay consideration of the petition in this case pending the filing of the Solicitor General's brief in *Murphy* and the Court's disposition of the *Murphy* petition. UPS respectfully suggests that it would be appropriate for the Court to grant certiorari in both this case and *Murphy* in order to address all aspects of the mitigation issue at one time. Alternatively, if the Court elects to address that issue exclusively in *Murphy*, this petition should be held pending the final disposition of *Murphy* and then resolved as appropriate in light of that disposition.

III. The Purported "Alternative" Holding Of The Court Below Does Not Militate Against Review

The court below purported to supply an "alternative" ground for its decision, stating that respondent may also qualify as "disabled" under the "regarded as" prong of the ADA's disability definition. Pet. App. 16a. This allegedly "alternative" ground does not militate against review in this case, however, because it is entirely dependent on the court's initial conclusion that monocular vision constitutes a disability under the definition discussed in Parts I and II above. Indeed, if it truly were an alternative ground for the judgment below, the court's analysis of the "regarded as" issue would conflict with the decisions of numerous other circuits, further justifying review in this case.

1. The "regarded as" prong of the ADA's definition of disability provides that an individual is entitled to the protections of the Act if he or she is "regarded as" having an impairment that substantially limits one or more major life activities, even though the individual does not in fact suffer from such an impairment. 42 U.S.C. § 12102(2)(C). In this case, respondent claims that one of Albertson's managers described him as "blind in one eye or legally blind." Pet. App. 17a. The court of appeals held that this statement, standing alone, was sufficient to create a "genuine issue of fact regarding whether Albertson's perceived [respondent] as disabled" within the meaning of the ADA. *Id.* at 16a.

Contrary to the court of appeals' suggestion (Pet. App. 16a), this conclusion does not constitute an "alternative" ground for the judgment below, because the court's "regarded as" holding is entirely dependent on its preceding determination that monocular vision constitutes a disability under the first prong of the definition. Simply stating that an individual is "blind in one eye or legally blind" cannot support a finding that the individual is "regarded as" disabled unless that statement

is the legal equivalent of saying "your monocular vision impairment renders you substantially limited in the performance of a major life activity" -- which would be true only if monocular vision in fact constituted a disability as a matter of law. Therefore, this supposed alternative ground is derivative of, and not an alternative to, the court's initial conclusion that monocular vision is in fact a disability under the ADA.

2. Any other reading of the Ninth Circuit's decision would create a clear circuit conflict over the interpretation of the "regarded as" prong. Numerous courts of appeals have held that an employer's mere recognition of an employee's impairment does not in itself prove that the employee is "regarded as" disabled, because it does not demonstrate that the impaired employee was viewed as being substantially limited in the performance of a major life activity.

In the leading case of *Kelly v. Drexel University*, 94 F.3d 102 (3d Cir. 1996), for example, the plaintiff, who suffered from a severe joint disease, lost his job. He sued under the ADA, claiming that his employer had terminated his employment because it regarded him as disabled. In *Kelly*, as in this case, the plaintiff's evidence consisted of (1) the employer's awareness of the employee's impairment, and (2) an adverse employment action. *Id.* at 109; Pet. App. 16a-17a. In *Kelly*, as in this case, the employer replied that it did not view the employee as disabled. *Kelly*, 94 F.3d at 109; Pet. App. 13a. The *Kelly* court affirmed summary judgment for the employer, holding that "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate . . . that the employer regarded the employee as disabled . . ." *Kelly*, 94 F.3d at 109.

Other courts of appeals consistently arrive at the same conclusion as the *Kelly* court. See, e.g., *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 153 (2d Cir. 1998) (quoting and relying on *Kelly* in rejecting "regarded as" claim); *Foreman v. Babcock & Wilcox*

Co., 117 F.3d 800, 806-07 & n.10 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998); *Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998) ("It is not enough for [plaintiff] to show that [defendant] was aware of her impairment; instead [plaintiff] must show that [defendant] knew of the impairment *and believed that she was substantially limited because of it.*") (emphasis added); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) ("The mere fact that [defendant] had such knowledge [of plaintiff's impairment], however, does not show that [defendant] regarded [plaintiff] as having a disabling impairment.").

In the present posture of this case, it is undisputed that respondent is essentially blind in one eye. Pet. App. 14a. Thus, the statement attributed to Albertsons' manager is nothing more than an accurate description of respondent's impairment. As the cases above make clear, every other circuit to address the question has rejected the notion that simply recognizing an individual's impairment constitutes a discriminatory perception of disability sufficient to entitle the impaired individual to the protections of the ADA under the "regarded as" prong of the statute. If the Ninth Circuit's discussion of the "regarded as" prong were truly intended to be an independent ground for the judgment below, it would necessarily conflict with all of the circuit precedents discussed above, thereby providing still further justification for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's consideration of *Murphy v. UPS*, No. 97-1992, and then disposed of in accordance with the Court's resolution of that case.

Respectfully submitted.

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No. 98-591

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC., PETITIONER,

v.

HALLIE KIRKINGBURG, RESPONDENT.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF THE
AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
IN SUPPORT OF PETITIONER**

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27 pp

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE**

Amici American Trucking Associations, Inc. ("ATA"), American Moving and Storage Association ("AMSA"), Towing & Recovery Association of America ("TRAA"), Specialized Carriers & Rigging Association ("SC&RA"), Truckload Carriers Association ("TCA"), National Tank Truck Carriers, Inc. ("NTTC"), Association of Waste Hazardous Materials Transporters ("AWHMT"), and National Automobile Transporters Association ("NATA") respectfully move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file a brief *amicus curiae* in support of petitioner. The consent of counsel for petitioner has been granted; the consent of counsel for respondent has been sought but not obtained.

ATA, a not-for profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

AMSA is the national trade association of the moving and storage industry. It has approximately 3,500 members worldwide and represents the entire spectrum of the United States domestic moving and storage industry. AMSA's membership includes 25 national van lines, 1,100 independent regulated carriers, 1,600 agents of van lines (1,000 of whom are also regulated carriers), and over 500 international movers.

TRAA is a national association of more than 1,400 towing and recovery operators serving North America.

TRAA is charged with promoting professionalism, quality customer service, and safety in towing operations throughout the country.

SC&RA is a national association of motor carriers that transport commodities whose unusual size or weight requires special transportation equipment. SC&RA's over 1,000 members include steel haulers, oil field equipment transporters, crane and rigging companies, millwright contractors, and transporters of construction and military equipment.

TCA is a national trade association representing the motor carrier industry's irregular-route truckload segment (such as dry van, refrigerated, flatbed, and dump trailers). TCA's more than 600 motor carrier members are domiciled throughout the continental United States, and serve the United States, Mexico, and Canada.

NTTC is a national trade association of 200 corporate members specializing in transporting hazardous materials, substances, and wastes in cargo tank trucks. Its members operate throughout the United States, Mexico, and Canada.

AWHMT is a national association of motor carriers that transport hazardous waste materials, such as industrial and radioactive wastes. Through its approximately 80 members, the AWHMT promotes professionalism and performance standards that minimize risks to the environment, public health, and safety.

NATA represents motor carriers that transport over 95% of all new motor vehicles through either driveaway or truckaway operations. NATA represents the joint interests of its nineteen carrier members, and seeks continuously to improve their quality of service, safety, and productivity.

Amici believe that their views should provide a useful supplement to the presentations of the parties. A clear,

consistent interpretation of the Americans with Disabilities Act ("ADA") is of paramount importance to *amici*'s members, who employ millions of men and women across the country. In particular, *amici*'s members need guidance on what constitutes a "disability" under the ADA. They must be able to formulate employment standards that ensure their employees do not pose a safety threat, but that at the same time do not discriminate against persons with disabilities who are truly qualified for the job. Of special concern are members' employment standards for over-the-road drivers, whose fitness for employment is crucial to public safety.

The courts of appeals' divergent approaches to the ADA's definition of "disability" have left the process of setting ADA-compliant employment and safety standards largely to guesswork. The lack of certainty and clarity in the disability determination puts members with employees in several circuits at a special disadvantage, since the validity of their employment and safety standards is determined by geographic happenstance. This is antithetical to the ADA's purpose, which is to set a uniform nationwide standard for employing persons with disabilities.

Amici and their membership are committed to equal employment opportunity and believe that discrimination in all forms should be eliminated from the workforce. A uniform definition of disability will help the *amici*, their members, and all employers to achieve this objective.

As set forth in the accompanying brief, *amici* believe that this case provides a suitable vehicle for this Court to settle a well-established circuit split that creates considerable difficulty for their members and for all employers.

Respectfully submitted.

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QUESTION PRESENTED

The *amici curiae* will address the following question:

Whether the Americans With Disabilities Act's definition of disability as a physical or mental impairment that "substantially limits" a major life activity mandates a functional analysis of any actual, significant restrictions that result from the impairment (as most circuits have held), or whether it is sufficient that an impairment merely affects, but does not significantly restrict, a major life activity (as the Ninth Circuit held in this case).

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**BRIEF AMICUS CURIAE OF THE AMERICAN
TRUCKING ASSOCIATIONS, ET AL.**

INTERESTS OF THE AMICI CURIAE¹

As explained in the foregoing motion for leave to file this *amicus* brief, the American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

AMSA is the national trade association of the moving and storage industry. It has approximately 3,500 members worldwide and represents the entire spectrum of the United States domestic moving and storage industry. AMSA's membership includes 25 national van lines, 1,100 independent regulated carriers, 1,600 agents of van lines (1,000 of whom are also regulated carriers), and over 500 international movers.

TRAA is a national association of more than 1,400 towing and recovery operators serving North America. TRAA is charged with promoting professionalism, quality customer service, and safety in towing operations throughout the country.

¹ This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

SC&RA is a national association of motor carriers that transport commodities whose unusual size or weight requires special transportation equipment. SC&RA's over 1,000 members include steel haulers, oil field equipment transporters, crane and rigging companies, millwright contractors, and transporters of construction and military equipment.

TCA is a national trade association representing the motor carrier industry's irregular-route truckload segment (such as dry van, refrigerated, flatbed, and dump trailers). TCA's more than 600 motor carrier members are domiciled throughout the continental United States, and serve the United States, Mexico, and Canada.

NTTC is a national trade association of 200 corporate members specializing in transporting hazardous materials, substances, and wastes in cargo tank trucks. Its members operate throughout the United States, Mexico, and Canada.

AWHMT is a national association of motor carriers that transport hazardous waste materials, such as industrial and radioactive wastes. Through its approximately 80 members, the AWHMT promotes professionalism and performance standards that minimize risks to the environment, public health, and safety.

NATA represents motor carriers that transport over 95% of all new motor vehicles through either driveaway or truckaway operations. NATA represents the joint interest of its nineteen carrier members, and seeks continuously to improve their quality of service, safety, and productivity.

As set forth more fully in the accompanying motion, *amici* and their members (most of whom have employees in more than one circuit) have a strong interest in the uniform application of the Americans with Disabilities Act ("ADA" or "Act"), including a nationally consistent interpretation of the concept of disability covered by the Act. As the facts of

this case illustrate, the conflict among the circuits as to whether disability under the ADA turns merely on whether a person has an impairment (as the Eighth and Ninth Circuits hold) or instead requires that an impairment substantially limit major life activities (as the Second, Third, Fifth, Seventh, Tenth and Eleventh Circuits hold) creates particular difficulties for employers in the trucking and motor carrier industries, who must balance important obligations of public safety and non-discrimination in employment.

STATEMENT

Petitioner Albertsons is the second largest grocery chain in the country, employing scores of over-the-road truck drivers to transport its goods. Albertsons' company policy is that all drivers must meet minimum Department of Transportation ("DOT") vision standards. Pet. App. 11a. DOT regulations provide that drivers cannot be certified as medically competent to drive unless their visual acuity scores are at least 20/40, corrected, in both eyes. 49 C.F.R. § 391.41(b)(10). When respondent Hallie Kirkingburg began working as a driver for Albertsons in 1990, he did not meet these minimum requirements. Although his right eye has a visual acuity rating of 20/20 with corrective lenses, his left eye visual acuity has been 20/200 since birth, a condition caused by amblyopia (commonly called "lazy eye"). This condition is not correctable with lenses. Kirkingburg's brain, however, has developed subconscious mechanisms to compensate for his condition.² Pet. App. 9a-10a, 14a.

² Before working at Albertsons, Kirkingburg held a number of jobs that depended to differing degrees on his ability to see. He trained and worked as a jet aircraft mechanic and crew chief to the basic air commander (1957-1960), worked as an auto mechanic for Los Angeles County (1968-1978 or 1979), and, beginning in 1979, drove commercial vehicles. Appellee Br. at 21 n.6.

Despite failing DOT and Albertsons' vision standards, Kirkingburg was erroneously certified as meeting them by two different medical examiners. In 1991, Kirkingburg injured himself falling from a truck and was out of work for about a year. Before returning, he was required by company policy to undergo another medical examination for recertification. This time, the examining physician correctly determined that the visual acuity in Kirkingburg's left eye was 20/200, a failing grade under DOT and company standards. The physician thus refused to certify Kirkingburg. Pet. App. 10a. Albertsons then determined that Kirkingburg was not qualified to drive the company's commercial vehicles and terminated him from the truck driver position. *Id.* at 11a.

A few months later, Kirkingburg presented the company with a waiver from the Federal Highway Administration ("FHWA") exempting him from the DOT's regulatory requirements under the FHWA's new vision waiver program. Pet. App. 11a, 37a-38a. Out of concern for public and driver safety, Albertsons declined to accept the waiver. *Id.* at 11a, 37a, 41a.

Kirkingburg filed suit in the United States District Court for the District of Oregon, claiming that Albertsons violated the Americans with Disabilities Act, 29 U.S.C. § 12101 *et seq.*, by refusing to accommodate his eye condition. Albertsons moved for summary judgment, arguing that Kirkingburg was not a qualified individual with a disability because he could not perform an essential function of his job—satisfying minimum DOT vision standards. The district court granted summary judgment on this ground. Pet. App. 36a-44a.

In a 2-1 decision, the Ninth Circuit reversed the district court. The majority held that Kirkingburg is disabled under the ADA because his "monocular" vision substantially limits the major life activity of seeing. In the alternative, Kirkingburg at least raised a material fact issue as to whether

Albertsons regarded him as disabled. The majority also held that Kirkingburg raised a material fact question as to whether he could perform the essential functions of a commercial truck driver, and that Albertsons' policy of requiring drivers to satisfy DOT vision acuity standards, without regard to whether they have FHWA vision waivers, is not a valid job-related requirement. Finally, the majority ruled that Albertsons failed to show that Kirkingburg and other waiver recipients posed a direct threat to safety. Pet. App. 8a-28a.

Judge Rymer dissented on the ground that satisfying DOT's usual vision acuity regulations was an essential function of Kirkingburg's job and that Albertsons was not obliged to employ as a driver a person who satisfied only the requirements of FHWA's experimental waiver program, not the DOT safety standards themselves. Pet. App. 28a-33a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress's goal in enacting the Americans With Disabilities Act was to "provide a clear and comprehensive national mandate" for eradicating disability discrimination through "clear, strong, consistent, [and] enforceable standards." 42 U.S.C. § 12101(b)(1)-(2). To date, ADA jurisprudence has been anything but clear and consistent; it is instead marked by an astonishing absence of standards. Even the very heart of the ADA—its definition of disability—has been the subject of varying, inconsistent interpretations. In particular, the courts of appeals are deeply divided about the legal standard applicable to the first of the ADA's three alternative definitions of disability: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). While many circuits interpret subsection (A)'s "substantially limits" language to demand a functional analysis of any significant limitations the plaintiff actually experiences, the decision below eschews this analysis, considering a mere "difference"

to constitute a disability without proof of any identifiable limitation.

The ADA, its implementing regulations, and its legislative history all mandate a functional, fact-based approach to determining whether an impairment is substantially limiting. But the Ninth Circuit's "difference" test stops at finding an impairment. Ignoring the statutory phrase "substantially limits," the Ninth Circuit's decision operates in the realm of the hypothetical, speculating without proof that an individual must be disabled by virtue of a particular medical diagnosis.

As the threshold to the Act's protection, the meaning of "disability" must be clear and consistent among all circuits. This Court began the clarification process last term with *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998), which delineated the appropriate three-step analysis under subsection (A): finding an impairment, identifying a major life activity, and conducting a fact-based inquiry into whether the impairment substantially limits the major life activity. The Court should continue this important process by now resolving the circuit split in the third step, settling once and for all the meaning of "substantially limits."

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH RULINGS OF NUMEROUS OTHER CIRCUITS AND OF THIS COURT

The Ninth Circuit held that "there is no question that Kirkingburg is substantially limited in the major life activity of seeing," rendering him disabled under the ADA's first prong. Pet. App. 14a. In support, the court reasoned that Kirkingburg "sees using only one eye; most people see using two." *Id.* at 14a-15a. The court acknowledged that Kirkingburg's brain has made adjustments to compensate for his condition. Nevertheless, it insisted that Kirkingburg's sight

is substantially limited because his peripheral vision and depth perception are "affected" and that "the manner in which he sees differs significantly from the manner in which most people see." *Id.* at 14a. The court gave no more than lip service to the EEOC's definition of substantial limitation, which requires a significant restriction on major life activities compared to the average person. *Ibid.* (citing 29 C.F.R. § 1630.2(j)(1)(ii)). And it brushed past the factors that the EEOC deems relevant to this analysis—the impairment's severity, duration, and long-term impact. *Ibid.* (citing 29 C.F.R. § 1630.2(j)(2)).

The decision below sharpens a well-defined circuit split on the meaning of the phrase "substantially limits." The Ninth Circuit frankly acknowledged that its analysis conflicts with a Fifth Circuit decision holding that a plaintiff with monocular vision was not disabled because his normal daily activities were not limited. Pet. App. 15a n.4 (citing *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997)). But that split also extends far beyond cases involving monocular vision. Addressing all manner of impairments, most circuits have interpreted "substantial limitation" to refer to current, significant functional limitations caused by the impairment, while the Eighth and Ninth Circuits consider mere "differences" or "effects" resulting from an impairment to be substantially limiting.

An example of the first approach is the Second Circuit's decision in *Ryan v. Grae & Rybicki P.C.*, 135 F.3d 867, 870-872 (2d Cir. 1998), which held that a plaintiff with colitis was not substantially limited in the major life activities of waste elimination or self-care. Before reaching its decision, the court rejected the notion that an "effect" on a major life activity equals a "substantial limitation":

Although almost any impairment may, of course, in some way affect a major life activity, the ADA

clearly does not consider every impaired person to be disabled. Thus, in assessing whether a plaintiff has a disability, courts have been careful to distinguish impairments which merely affect major life activities from those that substantially limit those activities.

Id. at 870 (citing *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995)). The court instead inquired whether the impairment caused significant, current functional limitations on the plaintiff's activities, guided by the severity, duration, and impact factors set forth in the EEOC regulations. It determined that, while Ryan's colitis was severe and went "to the very heart of her ability to control the elimination of waste," her showing was weak on duration and long-term impact because she exhibited limiting symptoms only periodically, and not at all in the past two years. *Id.* at 871-872.

The Third Circuit likewise focused on significant, current functional limitations in holding that a plaintiff diagnosed with degenerative hip joint disease was not substantially limited in the major life activity of walking. See *Kelly v. Drexel Univ.*, 94 F.3d 102, 106 (3d Cir. 1996). Like the Second Circuit, the Third Circuit looked to the EEOC for guidance, relying in particular on the EEOC's position that "to rise to the level of a disability, an impairment must significantly restrict an individual's major life activities. Impairments that result in only mild limitations are not disabilities." *Id.* at 107 (quoting 2 EEOC Compliance Manual § 902.4, at 902-19). Because the plaintiff had shown only that he had some difficulty walking and climbing stairs, and did not require any assistive devices, his impairment imposed only "moderate," not "significant," restrictions when compared to the average person. *Id.* at 106-107.

Like the Second and Third Circuits, the Fifth, Seventh, Tenth and Eleventh Circuits hold that the statutory phrase "substantially limits" requires a functional assessment of current, significant limitations on major life activities. See *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (plaintiff whose partial blindness limited peripheral vision was not substantially limited in seeing because he "offer[ed] no evidence that he is unable to engage in any usual activity"); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (would-be doctor's eye impairment not disabling because it limited only a narrow range of jobs, not general ability to see; "[t]he key is the extent to which the impairment restricts a major life activity; the impairment must be a significant one"); *Sutton v. United Air Lines*, 130 F.3d 893, 902-903 (10th Cir. 1997) (airline pilot applicants who corrected poor vision with lenses were not substantially limited in seeing since they "do not limit their normal daily activities" and admitted they "function identically to individuals without a similar impairment"); *Swain v. Hillsborough County Sch. Bd.*, 146 F.3d 855, 858 (11th Cir. 1998) (teacher's incontinence did not substantially limit working because she failed to "provid[e] evidence beyond the mere existence and impact of a physical impairment").

Meanwhile, the Eighth Circuit, like the Ninth, is content to hold that an impairment alone, if manifested in a "difference," is inherently disabling. See *Doane v. City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997) (police officer with glaucoma substantially limited in seeing because he is "blin[d] in one eye," which is "significantly different" from the way most people see).³

³ Related to this circuit split is another—whether the substantial limitation analysis should consider measures used to mitigate an impairment. Most circuits ignore mitigating measures that control otherwise severely limiting impairments, see, e.g., *Arnold v. United*

That the circuits apply such fundamentally different legal standards to the ADA's key coverage provision signals an urgent, clear need for this Court's intervention. To make matters worse, the Ninth Circuit's decision side-steps the analysis required by this Court in *Bragdon v. Abbott*, the seminal ADA case holding that asymptomatic HIV infection can be a disability. *Bragdon* delineated a three-step analysis for evaluating disability claims under the ADA's first prong. It instructed lower courts to conduct a separate, fact-intensive examination of impairment, major life activity, and substantial limitation. 118 S. Ct. at 2202. At the third step, the Court grounded its substantial limitation analysis firmly in the record evidence. *Id.* at 2206. The court below, in contrast, relied on the mere existence of Kirkingburg's medical condition—that he “sees using only one eye; most people see using two” (Pet. App. 14a-15a)—instead of evaluating his actual limitations, thereby prematurely halting the disability analysis at the impairment stage and allowing the court to ignore evidence that Kirkingburg's brain had compensated for his condition. It is impossible to square *Bragdon*'s insistence on a careful, fact-based inquiry into an individual's limitations with the Ninth Circuit's narrow focus on the existence of an impairment.

Parcel Serv., 136 F.3d 854 (1st Cir. 1998) (diabetes substantially limiting despite amelioration with insulin). Other circuits consider the limits of all impairments in their mitigated state, whatever their nature, see, e.g., *Murphy v. United Parcel Serv.*, 141 F.3d 1185 (10th Cir. 1998) (unpublished) (high blood pressure controlled with medication not substantially limiting). The Fifth Circuit holds that mitigating measures may be considered if they “amount to permanent corrections or ameliorations.” *Washington v. HCA Health Servs.*, 152 F.3d 464, 471 (5th Cir. 1998). This issue is presented in other petitions for certiorari currently before the Court. See *Murphy v. United Parcel Serv.*, No. 97-1992 (filed June 9, 1998); *Sutton v. United Air Lines*, No. 97-1943 (filed June 1, 1998).

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS AS A MATTER OF LAW

As *Bragdon* demonstrates, the ADA's “substantially limits” language demands on its face an analysis of the restrictions imposed by an impairment. By equating an impairment (poor vision in one eye) with a disability, the Ninth Circuit renders the statutory phrase “substantially limits” meaningless.⁴

That is not what Congress intended. Congress borrowed the ADA's definitions of disability from the Rehabilitation Act of 1973 (“RHA”), 29 U.S.C. § 701 *et seq.* See *Bragdon*, 118 S. Ct. at 2202 (the ADA's disability definitions are “drawn almost verbatim” from the RHA). Congress was well aware when it did so that courts interpreting the RHA had held that the phrase “substantially limits” confines coverage to persons whose activities are truly limited. See, e.g.,

⁴ The Ninth Circuit's alternative holding that Kirkingburg had raised a fact question about whether Albertsons perceived him as having a disability likewise ignores the phrase “substantially limits.” Under 42 U.S.C. § 12102(2)(C), which extends the ADA's protection to a person who is “regarded as having * * * an impairment,” the impairment must be perceived as substantially limiting, not just existing. See, e.g., *Kelly*, 94 F.3d at 109; *Sutton*, 130 F.3d at 900-901; *Ryan*, 135 F.3d at 872. The Ninth Circuit's observation that one manager described Kirkingburg as “blind in one eye or legally blind” shows only that Albertsons perceived him as impaired, not that it perceived him as substantially limited. Pet. App. 16a-17a. Three members of this Court have declared that this does not satisfy the “regarded as” prong. See *Bragdon*, 118 S. Ct. at 2214 n.1 (Rehnquist, C.J., Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part) (“Respondent has offered no evidence to support the assertion that petitioner regarded her as having an impairment that substantially limited her ability to reproduce, as opposed to viewing her as simply impaired”).

Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) ("requiring a substantial limitation of a major life activity * * * emphasizes that the impairment must be a significant one. It was open to Congress to omit these limiting adjectives, but Congress did not do so"). And Congress "intended that the relevant caselaw developed under the [RHA] be generally applicable to the term 'disability' as used in the ADA." 29 C.F.R. pt. 1630.2(g) app. (EEOC Interpretive Guidance).

The ADA's legislative history confirms that "substantially limits" precludes mere medical diagnoses or impairments from being disabilities under the first prong unless they impose significant functional restrictions. Representative Bartlett, the House Manager of the ADA, put it best: "The ADA includes a functional rather than a medical definition of disability." 136 Cong. Rec. 9072 (1990). Committee reports from both houses likewise state that a "substantial limitation" arises only when "the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989); H.R. Rep. No. 485, Pt. II, 101st Cong., 2d Sess. 52 (1990). "[M]inor, trivial impairment[s]" are excluded. S. Rep. No. 116, at 23; H.R. Rep. No. 485, Pt. II, at 52.

EEOC regulations and interpretive guidance implement Congress' directive that an impairment must "[s]ignificantly restric[t]" the "condition, manner or duration" of the plaintiff's activities compared to "the average person." 29 C.F.R. § 1630.2(j)(1)(ii) & app. The nature and severity of the impairment, its duration, and its long-term impact are all relevant considerations. *Id.* § 1630.2(j)(2). The EEOC explicitly rejects basing a disability determination on a medical condition (*id.* pt. 1630.2(j) app.):

The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others * * *.

All these sources require an evidentiary analysis of whether an impairment causes significant life restrictions. The Ninth Circuit simply asserted that Kirkingburg "has monocular vision. Given the nature of the condition and its permanence, there is no question that Kirkingburg is substantially limited in the major life activity of seeing." Pet. App. 14a. Absent from this conclusory statement is any mention of significant restrictions that Kirkingburg experienced compared to the average person. Conveniently ignored were the severity and impact factors, which belied any finding of substantial limitation in light of evidence that Kirkingburg had adapted to his condition.

The Ninth Circuit's decision contravenes Congress's intent to eschew a medical definition of disability in favor of a functional one. The court made no effort to ascertain the effect monocular vision had on Kirkingburg's life. As one commentator observed, the substantial limitation analysis "should emphasize the characteristics of a particular individual, not the abstract question of whether an impairment limits an activity. * * * Both Congress and the agencies have underscored the importance of emphasis on 'substantially.'" Anna P. Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 174-175 (1988). That the Ninth Circuit has strayed so far from what Congress intended, and what this Court and the EEOC have required, signals a serious need for this Court's clarification of the phrase "substantially limits."

III. THE ISSUE PRESENTED IS OF GREAT PRACTICAL IMPORTANCE

The Ninth Circuit's faulty analysis has far-reaching practical consequences. A functional standard is crucial for obtaining fair results with so-called "non-classic" impairments (such as depression, non-blinding eye impairments, joint and back ailments, and dyslexia), the limiting effects of which are often not readily apparent. Applying the Ninth Circuit's "difference" test to these impairments would always result in a finding of disability no matter how minor the limitation or how complete the plaintiff's adaptation, pulling within the ADA's coverage "minor," "trivial" impairments that Congress specifically sought to exclude.

A "difference" test also creates a perverse incentive for persons with non-limiting or minor impairments to misrepresent them as limiting when convenient to secure employment. A case in point is *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995), in which a would-be doctor claimed he could not pursue his chosen profession because of a visual impairment that prevented working for more than eight to ten hours at a time. Dr. Roth was diagnosed with eye impairments that affected his ability to fuse objects and sense depth. Despite this congenital condition, he completed pharmacy and law degrees—earning the latter full-time while working nights and weekends as a pharmacist—and served as a faculty lecturer and defense attorney/consultant while attending medical school, all without accommodation. On job and school applications, Dr. Roth characterized his vision as "cured." *Id.* at 1448-1449, 1454. The Seventh Circuit denied his request for a preliminary injunction ordering his admission to a residency program, holding that while his impairment "affected" major life activities, it did not "ris[e] to the level of a disability." *Id.* at 1454.

These facts would produce an absurd and unjust result under the "difference" test. Dr. Roth's diagnosed eye impairments and the evidence that they had some effect on his sight would render him disabled under the ADA's first prong. Ignored would be the contrary evidence that his eyes permitted lengthy, uninterrupted, eye-straining work, and the fact that he had represented to employers and educators that his vision suffered no limitations. In short, Dr. Roth used his impairment only when it was convenient—to get him the job of his choice. But as the Seventh Circuit observed, "there is a clear bright line of demarcation between extending the statutory protection to a truly disabled individual (so that he or she can lead a normal life * * *) and allowing an individual with marginal impairment to use disability laws as bargaining chips to gain a competitive advantage." *Id.* at 1460.

The same could be said of Kirkingburg, who performed sight-dependent jobs (including truck driving) for years before joining Albertsons, concealed his condition from the company for two years, then claimed to be disabled because he failed Albertsons' particular job requirement denying waivers from DOT standards. An individual is not "substantially limited" by virtue of exclusion from one job because of its particular requirements.⁵

The ADA should not permit an employee to assert a disabling medical condition, then point to the absence of actual limitations to skirt an employer's legitimate safety

⁵ See *Homeyer v. Stanley Tulchin Assocs.*, 91 F.3d 959, 961 (7th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996); *Aucutt v. Six Flags Over Mid-America*, 85 F.3d 1311, 1319 (8th Cir. 1996); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942-943 (10th Cir. 1994).

standards. Many individuals are not significantly restricted enough to be disabled, but nevertheless present genuine safety risks to themselves or others for particular jobs. A police force, for example, is entitled to exclude an officer with 20/200 vision, even if correctable to 20/20, because "officers are not able to call a 'time out' in emergencies while they look for their glasses or lost contact lenses." *Joyce v. Suffolk County*, 911 F. Supp. 92, 97 (E.D.N.Y. 1996). A University may prohibit a student with a cardiac defect from playing collegiate basketball to avoid the risk that he will suffer cardiac death. *Knapp v. Northwestern Univ.*, 101 F.3d 473, 479-482 (7th Cir. 1996). And a person with a minor sensory deficit in two fingers may be rejected as a firefighter because of the potential for injury if a burning ember drops into his glove. *Welsh v. City of Tulsa*, 977 F.2d 1415, 1416 (10th Cir. 1992). As the district court in this case aptly observed, "[i]f plaintiff were ever involved in an accident, defendant would have difficulty explaining why it hired a driver who could not meet DOT vision requirements." Pet. App. 41a. Employers should not have to choose between violating the ADA or being sued for negligence.

Employers cannot rely for protection on the ADA's requirements that employees be "qualified" (*i.e.*, able to perform the job's essential functions and meet job-related requirements) and not pose a direct safety threat. 42 U.S.C. §§ 12112(a), 12113(b). Under the Ninth Circuit's test, individuals who can point to a diagnosed medical condition will be deemed "different" and thus, disabled. Their lack of significant functional limitations, however, will permit a court to find them "qualified" and not a direct safety threat; the court can simply disregard any safety standard excluding these employees as unnecessarily strict.

Employers must be able to rely on a logical, reasoned interpretation of the disability definition to limit the Act's scope to those it was meant to protect. A functional analysis of an impairment's actual, significant restrictions achieves this; the Ninth Circuit's focus on whether an employee has a medical condition does not.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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No. 98-591

In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**JOINT APPENDIX
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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

June 29, 1995 - Plaintiff Kirkingburg filed amended complaint in the United States District Court for the District of Oregon.

July 7, 1995 - Defendant Albertsons filed answer with affirmative defenses and counterclaims.

Sept. 15, 1995 - Defendant Albertsons filed motion for summary judgment, memorandum in support of motion for summary judgment, affidavit of Michael V. Tom, affidavit of Dona Pike King, affidavit of Scott Jardine and affidavit of Tammy Polk.

Sept. 29, 1995 - Plaintiff Kirkingburg filed memorandum in opposition to defendant's motion for summary judgment.

Sept. 29, 1995 - Plaintiff Kirkingburg filed statement of facts in support of memorandum in opposition to defendant's motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed motion for leave to file amended motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed amended motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed memorandum in support of amended motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed statement of facts in support of amended motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed affidavit of Dona Pike King in support of amended motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed affidavit of Tammy Polk in support of amended motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed affidavit of Scott Jardine in support of amended motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed affidavit of Michael V. Tom in support of amended motion for summary judgment.

Oct. 3, 1995 - Record of order by Honorable Owen M. Panner granting defendant's motion for leave to file amended motion for summary judgment.

Oct. 11, 1995 - Plaintiff Kirkingburg filed supplemental additional concise statement of material facts in dispute.

Oct. 13, 1995 - Defendant Albertsons filed reply memorandum to plaintiff's memorandum in opposition to defendant's motion for summary judgment.

Oct. 18, 1995 - Plaintiff Kirkingburg filed motion to submit additional materials in opposition to defendant's motion for summary judgment.

Oct. 18, 1995 - Plaintiff Kirkingburg filed motion to supplement materials in opposition to defendant's motion for summary judgment.

Oct. 21, 1995 - Record of order by Honorable Owen M. Panner granting plaintiff's motion to supplement materials in opposition to defendant's motion for summary judgment.

Oct. 21, 1995 - Record of order by Honorable Owen M. Panner granting plaintiff's motion to submit additional materials in opposition to defendant's motion for summary judgment.

Oct. 25, 1995 - Opinion by Honorable Owen M. Panner granting defendant's motion for summary judgment.

Oct. 26, 1995 - Plaintiff Kirkingburg filed motion for reconsideration.

Nov. 6, 1995 - Defendant Albertsons filed memorandum in opposition to plaintiff's motion for reconsideration.

Nov. 9, 1995 - Order by Honorable Owen M. Panner denying plaintiff's motion for reconsideration.

Dec. 15, 1995 - Judgment of dismissal.

Dec. 22, 1995 - Plaintiff Kirkingburg filed notice of appeal.

Aug. 27, 1996 - Kirkingburg filed appellant's opening brief with the United States Court of Appeals for the Ninth Circuit.

Oct. 9, 1996 - Albertsons filed answering/opening brief of defendant/appellee.

Nov. 12, 1996 - Kirkingburg filed appellant's reply brief.

May 11, 1998 - Opinion and judgment entered by United States Court of Appeals for the Ninth Circuit.

May 23, 1998 - Albertsons filed petition for rehearing and suggestion for rehearing en banc.

July 1, 1998 - Order, amended opinion, and judgment entered by United States Court of Appeals for the Ninth Circuit.

July 8, 1998 - Order entered denying petition for rehearing and suggestion for rehearing en banc.

July 10, 1998 - Judgment entered, reversing District Court's award and remanding for further proceedings.

Oct. 6, 1998 - Albertsons filed petition for a writ of certiorari to the Supreme Court of the United States.

Nov. 9, 1998 - Kirkingburg filed brief in opposition to petition for a writ of certiorari.

Nov. 18, 1998 - Albertsons filed reply brief.

Jan. 8, 1999 - Supreme Court of the United States granted Albertsons' petition for a writ of certiorari.

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,)	
	)	No. CV95-549-PA
Plaintiff,)	
	)	AMENDED
v.	)	COMPLAINT
	)	AND DEMAND
ALBERTSON'S, INC., a	)	FOR JURY TRIAL
Delaware corporation,	)	(Disability
	)	Discrimination)
Defendant.)	

Plaintiff alleges:

I.

JURISDICTION AND VENUE

1. This is an action brought pursuant to the

Americans with Disabilities Act, 29 U.S.C. § 12110, et. seq.

2. This Court has jurisdiction of the claim pursuant to 28 U.S.C. § 1331.

3. All of the acts and omissions alleged herein in the District of Oregon.

II.

4. Plaintiff is a resident of the State of Oregon.

5. Defendant is a private corporation.

III.

STATEMENT OF CLAIMS

CLAIM ONE

(ADA)

6. Plaintiff was employed by Defendant as a truck driver until November 20, 1992 when he was terminated.

7. Plaintiff's visual acuity is 20/200 in his left eye. Defendant regarded Plaintiff as having a physical impairment on this account.

8. On December 3, 1991 Plaintiff sustained a compensable injury. Following his release for full duty Defendant subjected him to a physical examination. Defendant took the position that Plaintiff did not meet U.S. Department of Transportation vision requirements. He was told he could not drive without a vision waiver.

9. Subsequently, Plaintiff was denied reasonable accommodation and was discriminated against by Defendant in one or more of the following particulars:

(a) Defendant did not wait a reasonable period of time to allow Plaintiff to obtain a vision waiver;

(b) Defendant would not allow Plaintiff to return to work as a driver even with a vision waiver; and/or

(c) Defendant failed and refused to reasonably accommodate Plaintiff by reassigning Plaintiff to other suitable work.

10. As a result of said acts Plaintiff has suffered emotional distress in the sum of \$300,000.

11. As a result of said acts Plaintiff has suffered economic loss in an amount to be proven at trial, which sum is alleged to be approximately \$500,000.

12. Defendant's acts were wilful and wanton and Defendant should be assessed punitive damages in the sum of \$300,000.

13. Plaintiff is entitled to his reasonable attorneys' and expert witness' fees under the Act. 42 U.S.C. 12110, et. seq.

14. Plaintiff timely filed charges with the appropriate civil rights administrative agency and this case was filed within 90 days of receipt of a right to sue letter.

DEMAND FOR JURY TRIAL

15. Plaintiff demands a jury trial.

WHEREFORE, Plaintiff prays for judgment as stated in his claims alleged above.

DATED this 29th day of June, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

ANSWER WITH AFFIRMATIVE DEFENSES AND
COUNTERCLAIM

For answer to plaintiff's Amended Complaint and demand for jury trial, defendant Albertsons, Inc. ("Albertsons") admits and denies as follows:

1.

Albertsons admits that plaintiff brings an action under the auspicious of the American with Disabilities Act, 29 U.S.C. §12110 et seq. at paragraph 1 of plaintiff's Amended Complaint.

2.

Albertsons admits the allegation at paragraph 2 of plaintiff's Amended Complaint.

3.

Albertsons admits that the alleged actions complained of occurred within the District of Oregon.

4.

Albertsons admits the allegations of paragraph 4 of plaintiff's Amended Complaint that plaintiff is a resident of the State of Oregon.

5.

In response to paragraph 5 of plaintiff's Amended Complaint, Albertsons admits that Albertsons is a public corporation.

6.

In response to paragraph 6 of plaintiff's Amended Complaint, Albertsons admits that it processed the initial termination papers November 20, 1992 because there was not a job at the time for which plaintiff was qualified and that when Albertsons had a job for which plaintiff was qualified,

he was offered, but refused, the position.

7.

Albertsons admits that plaintiff's visual acuity has been reported as 20/200 in his left eye. Albertsons denies the remaining allegations at paragraph 7 of plaintiff's Amended Complaint and the whole thereof not expressly admitted here.

8.

Albertsons admits that on December 3, 1991, plaintiff sustained an on-the-job injury which Albertson's workers compensation carrier determined was compensable. Albertsons admits that following plaintiff's release for full duty, Albertsons required plaintiff to undergo a physical examination. Albertsons admits that the results of the physical examination indicated that plaintiff did not meet the United States Department of Transportation vision requirements. Albertsons denies the remaining allegations at paragraph 8 of plaintiff's Amended Complaint and the whole thereof not expressly admitted here.

9.

Albertsons denies the allegations at paragraph 9 of plaintiff's Amended Complaint and the whole thereof.

10.

Albertsons denies the allegations at paragraph 10 of plaintiff's Amended Complaint and the whole thereof.

11.

Albertsons denies the allegations at paragraph 11 of plaintiff's Amended Complaint and the whole thereof.

12.

Albertsons denies the allegations at paragraph 12 of plaintiff's Amended Complaint and the whole thereof.

13.

Albertsons denies the allegations at paragraph 13 of plaintiff's Amended Complaint and the whole thereof.

14.

Albertsons admits the allegations at paragraph 14 of plaintiff's Amended Complaint.

15.

Albertsons admits that at paragraph 15 of his Amended Complaint plaintiff has demanded a jury trial.

16.

Albertsons denies each and every allegation of plaintiff's Amended Complaint and the whole thereof not expressly admitted herein.

For its FIRST AFFIRMATIVE DEFENSE, Albertsons realleges those matters admitted above and further alleges:

17.

Plaintiff's Amended Complaint has failed to state a claim on which relief can be granted.

For its SECOND AFFIRMATIVE DEFENSE, Albertsons admits and alleges as it has above and further alleges:

18.

Plaintiff has failed adequately to mitigate his damages.

For its THIRD AFFIRMATIVE DEFENSE, Albertsons admits and alleges as it has above and further alleges:

19.

Plaintiff's allegations, and each of them, fail to support an award of punitive damages.

For its FIRST COUNTERCLAIM, Albertsons realleges those matters admitted and alleged above and further alleges:

20.

Plaintiff's claims against Albertsons are meritless and frivolous and Albertsons is entitled to its reasonable attorney

fees, expert witness fees, costs and disbursements under 42 USC §1220, et seq.

WHEREFORE, having fully answered plaintiff's Amended Complaint, Albertsons prays for judgment against plaintiff:

1. Dismissing this action with prejudice; and
2. Awarding Albertsons its reasonable attorney fees, costs and disbursements and whatever other damages this Court deems just and equitable.

Respectfully submitted this 7th day of July, 1995.

GORDON, McKEON & RIVES

By: s/ Corbett Gordon
Corbett Gordon, Attorneys for
Defendant Albertson's, Inc.

(Certificate of Service omitted in printing)

(Caption omitted in printing)

MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Plaintiff respectfully submits the following memorandum in opposition to Defendant's Motion for Summary Judgment.

I.
STATEMENT OF FACTS

Plaintiff was first employed by Defendant as a truck driver in 1990. Pl. Depo. 165.

Plaintiff was born May 21, 1938. Pl. Depo. 8. He has an associate degree from Cerritos Junior College in Norwalk, California. Pl. Depo. 10. He was a jet aircraft mechanic in the United States Air Force, where he was a crew chief to a basic air commander. Pl. Depo. 12-14. He was honorably discharged. Pl. Depo. 14. From 1969 to 1978 or 1979 he was an auto mechanic for Los Angeles County. Pl. Depo. 148-9. He also did some road test driving for the county. Pl. Depo. 150-1. He left the county to drive trucks, first for Global Van Lines, then as an independent trucker. Pl. Depo. 150, 152, 153. He owned his own Kenwood truck. Pl. Depo. 153-4. He moved to Oregon in 1980 or 1981 where he settled in Tillamook County and won the county garbage hauling contract. Pl. Depo. 155-7. He kept that contract until 1988 or 1989, when he began driving trucks for Pastega Trucking. Pl. Depo. 159-61. He continued driving for Pastega until he began work for Albertson's as a truck driver in 1990. Pl. Depo. 165.

Plaintiff has a good driving record. Pl. Depo. 234-235, 280-281. He has never been in an accident that was his fault. Id. He has no disqualifying moving citations on his

driving record. Id., Ex. 3; Sturgill Depo. 38.

At the time Plaintiff was hired by Defendant, Ted Sturgill, transportation manager, gave him a 16 mile road test and certified, "It is my considered opinion that his [sic] driver possesses superior driving skill to operate safely the type of commercial motor vehicles listed above." Ex. 20, Sturgill Depo. 47-48. The reference listed above was to a 1988 Kenworth, with a 1989 50' utility trailer. Ex. 20. Mr. Sturgill found Mr. Kirkingburg to be a safe driver in that road test. Sturgill Depo. 47-48. Plaintiff was given a physical examination and passed at the time of his hire in 1990. Sturgill Depo. 34-5; Ex. 22. He had a valid Department of Transportation (DOT) card to drive a truck at that time. Id. at 36. Thereafter, Mr. Sturgill found Plaintiff to be a safe driver. Sturgill Depo. 32. Likewise, his boss, Frank Riddle, General manager, found Plaintiff to be a good, safe driver. Riddle Depo. 5, 6, 14-15. Plaintiff had a valid DOT card in 1991. Sturgill Depo. 34, Ex. 23.

Plaintiff has always had 20/200 corrected vision in his left eye. Pl. Depo. 42-43. He is 20/20 corrected in his right eye. Id. The reduced acuity in his left eye is due to amblyopia, a condition marked by low or reduced visual acuity not correctable by refraction means and not attributable to an eye disease. Aff. of Beatrice Michel; Ex. 24. The condition is said to exist if the vision is 20/30 or worse with best correction. Id. With that condition he could easily perform the driving tasks required of him, in the opinion of his doctor. Id. The amblyopia in the left eye does not interfere with his ability to drive. Id. According to Plaintiff, the condition has never interfered with his work. Pl. Depo. 46.

Plaintiff suffered a work-related injury in 1991 when he had a fall from a truck and hurt his head, shoulder and hand. Pl. Depo. 36-37. He was released unconditionally to

return to work on November 3, 1992. Pl. Depo. 91, 252; Ex. 29. Instead of returning Plaintiff to work, Defendant sent Plaintiff to its doctor for examination. Pl. Depo. 92. Plaintiff saw a Dr. Douglas Eubanks, who gave him an unusually thorough examination. Pl. Depo. 94. He was told he needed a "vision waiver." Pl. Depo. 95. Dr. Eubanks found his vision to be 20/200 in his left eye as of November 6, 1992. Ex. 17. The doctor noted that this was his corrected vision in that eye "since birth." Id.

Defendant's drivers are to be certified by the Department of Transportation (DOT). Riddle Depo. 11-13; Sturgill Depo. 32. Defendant has no physical requirements for vision other than what is contained in DOT regulations. Id. DOT regulations call for a minimum 20/40 vision corrected in each eye. Ex. 34. There is nothing in writing at Albertson's which specifically adopts those physical requirements as its own. Sturgill Depo. 24. Prior to November 6, 1992 the DOT instituted a vision waiver program whereby under certain limited circumstances it would issue waivers to allow drivers who could not meet the minimum vision qualifications of DOT to operate motor vehicles. Sturgill Depo. 57; Ex. 43. The purpose of the program was to accommodate individuals where it was reasonable to do so under the Americans With Disabilities Act, but not sacrifice highway safety. Federal Register, Vol. 57, No. 58 at 10295 (March 25, 1992).

On November 20, 1992 Ted Sturgill called Plaintiff and informed him that "We're not going to accept the waiver." Pl. Depo. 69-70; Ex. 25. It was Mr. Sturgill's understanding that Plaintiff was terminated for failure to pass a DOT physical. Sturgill Depo. 9. This was not his decision. Sturgill Depo. 9. He does not know who made the final decision, but believes it came from "Boise Legal." Sturgill Depo. 9. That decision was communicated to him by Mr.

Frank Riddle. Id. Mr. Riddle told him that Plaintiff had failed the visual part of the DOT physical and that the company would not accept a vision waiver. Id. at 10. Mr. Riddle told him Plaintiff was "legally blind or blind in one eye." Sturgill Depo. 25. Mr. Sturgill testified there was no other reason for the termination. Id. at 20. Mr. Sturgill testified that Mr. Riddle directed him to terminate Plaintiff. Id. at 22. Prior to that time, Mr. Sturgill had seen nothing in writing that the company would not accept vision waivers. Sturgill Depo. 24. A termination form was completed for Plaintiff at that time. Norris Depo. 9; Ex. 26.

Mr. Sturgill recalls discussion about other positions for Plaintiff to perform. Sturgill Depo. 22. He does not recall if there was discussion about other work for Plaintiff before his termination. Sturgill Depo. 23. Mr. Sturgill did not try to find Plaintiff work. Sturgill Depo. 30. Mr. Riddle was aware that the employer had to reasonably accommodate disabled persons and testified he believed efforts were made by the company to find other jobs for Plaintiff. Riddle Depo. 9, 10, 11, 22. He expected his subordinate to look for other work for Plaintiff, specifically Charlie Norris was expected to do that. Riddle Depo. 24. He testified that had Plaintiff not turned down a "yard hostler" and "tire man" positions he would be employed there today. Riddle Depo. 57-58.

Defendant did make some contacts with Plaintiff to offer him other positions. Pl. Depo. 4-5. Plaintiff was an injured worker who under Oregon Law had reinstatement rights. Pl. Depo. 29 (ORS 659.415 and 659.420). Further, Defendant's own policy required reasonable accommodation. Ex. 1; Norris Depo. 24. In addition, as memorialized in the Scott Jardine, Corporate Director of Transportation, memorandum of June 4, 1993: "In situations where reasonable accommodation to a driver with a disability are legally required, our priority is to accommodate the driver in

ways other than a DOT minimum qualification waiver." Ex. 43; Sturgill Depo. 57.

Plaintiff remembers a call about a job moving trailers which he thought he had. Pl. Depo. 4. This was a "yard hostler" position. A "yard hostler" drives trailers within the confines of the facility, moves empty trailers into the dock, loads ones away from the dock, and stages them for dispatch. Riddle Depo. 27; Sturgill Depo. 31. Although DOT certification is required for that position, it does not have to be. Riddle Depo. 40. The position is designed so it can be retained in the yard. Riddle Depo. 41. The hostlers are not allowed on the road. Id. at 40. The equipment they operate are not road licensed to begin with. Id. at 40. If they are out on the road they are "in violation." Riddle Depo. 40. The job is required seven days a week, 24 hours a day, is staffed with 5 or 6 positions, which positions can be temporary or permanent. Id. at 40, 42-43.

This was the first job Defendant spoke with Plaintiff about. Pl. Depo. 77; Ex. 41. Plaintiff was asked by his union rep to call Frank Riddle, which he did. Pl. Depo. 77. Mr. Riddle said he did not know about it and that he would have Frank Sturgill call back. Pl. Depo. 78. Mr. Sturgill called back and said Plaintiff was supposed to go to the Portland distribution center, which he did. Pl. Depo. 78. After a one hour wait, Mr. Sturgill rudely asked Plaintiff if he had a DOT card, and Plaintiff replied he did and showed it to him. Pl. Depo. 79. By this time, Plaintiff had obtained a DOT vision waiver and a valid DOT card. Pl. Depo. 80. Mr. Sturgill gave Plaintiff papers to read on how to hook up a trailer and asked him to wait in the lunchroom. Pl. Depo. 80. Then Dave Cooper, dispatch supervisor, told Plaintiff that Mr. Sturgill said to take the papers home and read them, "We'll be calling you." Pl. Depo. 80-81. Plaintiff went home, but was never called. Pl. Depo. 81. He was never given an

explanation why he did not get that job. Pl. Depo. 5. Mr. Riddle was told by Don King, an attorney with Albertson's, that Plaintiff had turned down the yard hostler position. Riddle Depo. 55. Plaintiff never turned it down. Pl. Aff.

Subsequently, Defendant informed the Bureau of Labor and Industries that it withdrew the offer because "we became concerned because the position does require DOT certification." Ex. 48. Mr. Riddle was unaware the offer had been withdrawn. Riddle Depo. 29. Mr. Norris was unaware it had been made. Norris Depo. 34.

Sometime later, the second job which was discussed with Plaintiff was a "tire man," but Plaintiff rejected that position because he had never changed a truck tire in his life, was told it would be \$8 - \$9 per hour, \$5 - \$6 less than what he had been making, and would not get him back to driving trucks. Pl. Depo. 85-87. He also recalls that there was an experience requirement for that job that he did not satisfy. Pl. Depo. 101.

Other jobs which became available, but which were not discussed with Plaintiff, included warehouse and dispatcher positions. Riddle Depo. 22, 23; Cooper Depo. 5, 7.

Although Defendant claimed it would not allow its drivers to drive unless they met the minimum DOT vision physical requirement of 20/40 corrected vision in each eye (Ex. 47), Plaintiff was allowed to drive for it when first hired in 1990 despite a corrected vision of 20/70 in his left eye, according to a company doctor, Robert Eubanks, Ex. 22, and was permitted to drive in 1991 despite a corrected vision of 20/100 in his left eye, according to a different company doctor, Theresa Eubanks. Sturgill Depo. 52; Ex. 23. These reports were in Defendant's possession at the time, and raised no "red flags" so to speak. Sturgill Depo. 25, 26, 28, 32-3, 36, 48, 49; Pl. Depo. 262-4. No effort was made to disqualify

him. Sturgill Depo. at 33. He was thought to be a safe driver. Sturgill Depo. at 32.

Defendant's personnel manager was aware of its reasonable accommodation requirement, but knows of no undue hardship which would have been caused to it by accepting a vision waiver. Norris Depo. 6, 7, 8, 24. Mr. Sturgill believed the undue hardship to be the "liability." Sturgill Depo. 37. Yet, Mr. Riddle testified that when Plaintiff drove for Albertson's he was not a safety hazard. Riddle Depo. 31.

Mr. Riddle testified that Defendant would accept changes in DOT minimum requirements, but if the DOT said to accommodate disabled persons it may waive certain of those requirements, this would not be acceptable. Riddle Depo. 13.

Mr. Riddle said according to the reports he saw, Plaintiff's vision was deteriorating. Riddle Depo. 15. He testified that before making the decision to terminate, he instructed Charlie Norris, personnel manager, to review Plaintiff's vision file with Plaintiff. Riddle Depo. 16-18. This never happened. Norris Depo. 9-10; Pl. Aff. It was not true that Plaintiff's vision had been deteriorating. Pl. Aff.; Aff. of Beatrice Michel; Ex. 24. Plaintiff's vision in his left eye tested out by his own doctor at 20/200 in 1988 and on October 19, 1992. Ex. 16; Ex. 21. There was no discussion about sending Plaintiff for another exam or getting his history from his doctor. Sturgill Depo. 58.

After Plaintiff's termination, he received a vision waiver from the DOT. Pl. Depo. 75. This was obtained on February 25, 1993. Id.; Ex. 36; Ex. 37. He had requested Defendant's help in obtaining the waiver in December 1992 because the DOT required that the employer provide certain of the information necessary to obtain the waiver. Ex. 32. He had first applied for the waiver on November 12, prior to

the November 20 call terminating his employment. Ex. 32. Defendant's personnel manager was instructed by Mr. Riddle not to respond to the request. Norris Depo. 32; Riddle Depo. 43. Mr. Riddle told him he would take that up with the corporate people. Riddle Depo. 43. Plaintiff advised Defendant he obtained the vision waiver on March 1, 1993. Ex. 39; Ex. 40. Mr. Sturgill became aware he had received it. Sturgill Depo. 56.

Plaintiff had also requested to be reinstated on December 18, 1992. Ex. 29. That request was denied. Ex. 34.

Plaintiff was identified by Defendant as the "driver with the vision problem in Portland" by Scott Jardine on January 29, 1993. Ex. 35.

II. STATEMENT OF LAW

A. Defendant's Motion for Summary Judgment On Plaintiff's Disability Discrimination Claim Should Be Denied.

1. Plaintiff Has Adduced Evidence Which Raises A Question of Fact As To Whether He Could Perform The Essential Functions Of His Job And As To Whether Defendant Failed To Accommodate His Impairment.

(a) Plaintiff Is Physically Impaired.

Plaintiff has disability/perceived disability discrimination claims based upon his visual impairment under the American With Disabilities Act (hereafter "the ADA"), 42 U.S.C. §12101, *et. seq.*, which prohibits discrimination in the terms, conditions and privileges of

employment against an individual with a disability. 42 U.S.C. §12112.

Under the ADA an individual is protected if he or she is:

"(1) a person with a physical or mental impairment that substantially limits one or more major life activities;

(2) a person with a record of such physical or mental impairment; or

(3) a person is regarded as having such an impairment."

42 U.S.C. §12102(2). The ADA defines a physical impairment as:

"[a]ny physical disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs"

29 C.F.R. §1630.2(h).

A "major life activity" is defined to include seeing or working. 29 C.F.R. App. §1630.2(i).

The ADA is patterned after the Rehabilitation Act of 1973, Pub.L.No. 93-112, 87 Stat. 355, codified as amended at 29 U.S.C. §2 701-796i, and therefore it is appropriate when examining it to examine the scope of the federal law on which it is based. 29 C.F.R. §1630.1(c).

It has been held under the Rehabilitation Act of 1973 that someone who is legally blind is a handicapped individual. Norcross v. Sneed, 573 F.Supp. 533, 536 (W.D.

Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir.); *see Gurmankin v. Costanzo*, 411 F.Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3rd Cir. 1977) (a blind person "is certainly" a handicapped person under the Rehabilitation Act). In *McNutt v. Hills*, 426 F.Supp. 990 (D.D.C. 1977), the court implicitly held that the individual, who had retinitis pigmentosa, was handicapped under the Rehabilitation Act in its discussion of jurisdiction and mandamus. 426 F.Supp. at 998 fn. 19. It has also been held that someone with extremely poor sight is handicapped under the Rehabilitation Act. *Sharon v. Larson*, 650 F.Supp. 1396, 1401 (E.D. Pa. 1986) (it is not disputed that an individual who had visual acuity with the right eye of 20/200 and visual acuity with the left eye of 20/300 using corrective lenses is handicapped under the Act); *see generally* Francis M. Dougherty, Who is "Individual With Handicaps" Under The Rehabilitation Act of 1973 (29 USCS §§701 et. seq), 97 ALR Fed 40, §4[b] and 4[c], pp. 58-60.

Here, Defendant does not challenge that Plaintiff's vision impairment qualifies as a physical impairment under the ADA; rather, Defendant argues Plaintiff is not an otherwise qualified individual.

(b) Plaintiff Is A Qualified Individual With A Disability.

The ADA prohibits discrimination against any "qualified individual" with a disability. 42 U.S.C. §12112. Under the ADA, a "qualified individual with a disability" is one who "with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). The analysis under the ADA is two step: first, whether the individual satisfies the prerequisites for the position; and,

second, whether or not the individual can perform the essential functions of the position held with or without reasonable accommodation. 29 C.F.R. §1630.2(m). Whether a particular function is essential is a factual determination that must be made on a case by case basis, considering all relevant evidence. 29 C.F.R. App. §1630.2(n).

Here, there is a question of fact as to whether Plaintiff could perform the essential function of truck driving. Plaintiff had performed the duties of the position without being at fault in an accident since his hire. Pl. Depo. 234-235, 280-281. His supervisors tested him and believed he was a safe driver. Sturgill Depo. 32, 47-48; Riddle Depo. 5, 6, 14-15; Ex. 20. His amblyopia in the left eye did not interfere with his ability to drive, never interfered with his work, and in the opinion of his doctor even with the condition he could still easily perform the driving tasks required of him. Pl. Depo. 46; Aff. of Beatrice Michel; Ex. 24. In sum, there is evidence which raises a question of fact as to whether Plaintiff could perform the essential function of truck driving.

Defendant argues that Plaintiff was not otherwise qualified because Plaintiff did not meet the DOT minimum requirements for interstate truck driving, which Defendant considers to be an essential requirement of the job. Def's Memo. at 6. The premise of Defendant's argument is that Plaintiff needed to meet the DOT physical requirements for interstate truck driving and that therefore those physical requirements somehow equate to an essential function of the job. However, it is not the DOT vision requirements that are an essential function of the job; it is the DOT certification. *See* Riddle Depo. 11-13; Sturgill Depo. 24, 32, 57; Ex. 43.

Defendant has no physical requirements for vision other than what is contained in the DOT regulations. Riddle Depo. 11-13; Sturgill Depo. 32. Plaintiff's argument that the

DOT vision requirements are not truly an essential function of the job is strengthened by the fact that although Defendant claimed it would not allow drivers to drive unless they met the minimum DOT vision requirement in each eye,¹ Plaintiff was hired to drive in 1990 despite a corrected vision of 20/70 and permitted to drive in 1991 despite a corrected vision of 20/100. Sturgill Depo. 52; Ex. 23; Ex. 47. Indeed, these reports of supposedly deficient vision did not raise any concerns ("red flags") at the time and no attempt was made to disqualify Plaintiff. Sturgill Depo. 25, 26, 28, 32-33, 36, 48, 49; Pl. Depo. 262-4. Thus, evidence exists that raises a question of fact as to the first step in the essential functions analysis: Plaintiff could perform the essential functions of the job.

The second step of the analysis is whether any reasonable accommodation can be made by the employer that would enable Plaintiff to perform the function of his job. Defendant relies upon Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1386 (1994) to argue that as a matter of law a truck driver with impaired vision who does not meet the DOT requirements in 49 C.F.R. §391.41 cannot be reasonably accommodated because of the inherent safety risk. Defendant's reliance on Chandler is misplaced, for the issue of a DOT vision waiver was not addressed in that case.

In a later case, Sarsycki v. United Parcel Service, 862 F.Supp. 336 (W.D. Okl. 1994), the court noted that "the Chandler holding has been undermined by the fact that the FHWA [Federal Highway Administration] has recently instituted a waiver program for . . . drivers of commercial

¹ DOT requirements are corrected vision of at least 20/40 in each eye. Ex. 47.

motor vehicles which the FHWA believes is 'consistent with the safe operation' of those vehicles." 862 F.Supp. at 341 (discussing insulin-dependent drivers). As the court noted in Sarsycki, "[t]his change in policy was partly a result of an ADA mandate requiring the FHWA to conduct a review of its regulations 'in order to ascertain whether the standards conform with the current knowledge about the capabilities of persons with disabilities.'" *Id.*, citing 58 Fed. Reg. 40,693 (1993). Although the court in Sarsycki was discussing insulin-dependent drivers, the analysis is equally applicable to the present case and the criticism of Chandler equally apt.

The problem with Defendant's safety risk defense, and the analysis in Chandler on which it relies, is that an "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices." Bombrys v. City of Toledo, 849 F.Supp. 1210, 1219 (N.D. Ohio 1993) (blanket disqualification of individuals with insulin-dependent diabetes as candidates for police officer violates ADA); accord Anderson v. Little League Baseball, Inc., 794 F.Supp. 342, 345 (D. Ariz. 1992). Indeed, the requirement for individualized assessments was one of the reasons for the DOT's waiver program. Federal Register, Vol. 57, No. 58 at 10295. Here, if such an individualized assessment had occurred, Defendant would have allowed Plaintiff to continue to drive, for Mr. Riddle believed that when Plaintiff drove for Defendant he was not a safety hazard. Riddle Depo. 31. Indeed, Plaintiff has had this same visual impairment since birth and has driven trucks for Defendant and others for years without incident. Pl. Depo. 42-43, 150-57, 159-61, 165, 234-235; Ex. 3; Sturgill Depo. 38.

Defendant's blanket disqualification of Plaintiff is evidenced by Mr. Riddle's testimony that Defendant would accept changes in DOT minimum requirements, but if the

DOT said to accommodate disabled persons it may waive certain of those requirements, it would be unacceptable. Riddle Depo. 13. Furthermore, there was no discussion about sending Plaintiff for another exam or getting his history from his doctor. Sturgill Depo. 58. Having failed to conduct an individualized assessment of the relative safety risks, Defendant is not entitled to judgment as a matter of law on the issue of whether Plaintiff was an otherwise qualified individual with a disability.

(c) No Reasonable Accommodation Was Attempted.

The term "reasonable accommodation" is an open-ended one. Schmidt v. Safeway, Inc., 864 F.Supp. 991, 996 (D. Or. 1994). The statutes and regulations offer examples, but caution that the term is not limited to those examples. *Id.*, citing 42 U.S.C. §12111(9); 29 C.F.R. §1630.2(o); 29 C.F.R. Pt. 1630, App. "An employer may, in appropriate circumstances, have to consider the provision of leave to an employee as a reasonable accommodation, unless the provision of leave would impose an undue hardship." Schmidt v. Safeway, Inc., *supra*, 864 F.Supp. at 996 (citations omitted). Here, one possible reasonable accommodation not given was leave to obtain a vision waiver.

In the present case, sandwiched into its "Plaintiff is not a qualified individual" argument, Defendant argues it took steps that satisfy any reasonable accommodation requirement that may exist. Defendant cites to its offer of a job as "yard hostler" and later as a "tire man." Indeed, Mr. Riddle testified that had Plaintiff not turned down the "yard hostler" and "tire man" positions, he would be employed there today. Riddle Depo. 57-58.

The problem with Defendant's argument is that

Plaintiff never turned down the "yard hostler" position. Pl. Aff. Indeed, he thought he had the position. Pl. Depo. 4. Furthermore, a question of fact exists as to whether Defendant asserted explanation for "withdrawing" the offer is pretextual.

Defendant argues it withdrew the yard hostler position because it became concerned about safety issues since the position required DOT certification. Def's Memo. p. 9. However, evidence exists that the nature of the job would not require DOT certification; and, in fact, Plaintiff had the required DOT certification. While discussing the position with Mr. Sturgill, when rudely asked if he had a DOT card, Plaintiff presented it since by that time he had obtained a DOT vision waiver and a valid DOT card. Pl. Depo. 78-80.

The yard hostler drives trailers within the confines of the facility and hostlers are not allowed on the road, for the equipment they drive are not road licensed. Riddle Depo. 27, 40; Sturgill Depo. 31. Indeed, although DOT certification is required by Defendant, it does not have to be, for the position is designed so it can be performed within the confines of the yard. Riddle Depo. 40-41. Thus, a question of fact exists as to whether DOT certification was a requirement and as to whether safety was the motivating concern.

Defendant claims it withdrew the yard hostler offer after Plaintiff did not accept it, implying Plaintiff delayed or was partly responsible for not getting the position. However, evidence exists that Plaintiff did all that was asked of him to assist in getting the position. He called Mr. Riddle; he talked to Mr. Sturgill; he went to the Portland distribution center; he waited there and presented his DOT card when asked for it; and, he took the papers given him home to them and wait for Defendant's call. Pl. Depo. 77-81; Ex. 41. Although Plaintiff went home, he was never called and never given an explanation as to why he did not get the job. Pl. Depo. 5, 81.

Additional evidence of pretext is that Mr. Riddle was unaware the offer had been withdrawn and had been told Plaintiff rejected it. Riddle Depo. 29, 55.

Regarding the second job discussed with Plaintiff, "tire man," Plaintiff rightfully rejected that offer because he had no experience doing that job, it paid substantially less per hour (\$8 - \$9 per hour, which is \$5 - \$6 less than what he had been making) and he did not satisfy an experience requirement. Pl. Depo. 85-87, 101. For a reassignment to be a reasonable accommodation, it needs to be "to an equivalent position in terms of pay, status, etc." 29 C.F.R. §1630, App. §1630(2)(o).

As to other job "offers," there is a question of fact as to whether Defendant considered Plaintiff for either a warehouse position or a dispatcher position. Defendant argues it encouraged Plaintiff to apply for a warehouse position, but he failed to pass a qualifying test. However, there is also evidence that other jobs that became available, including warehouse and dispatcher positions, were not discussed with Plaintiff. Riddle Depo. 22, 23; Cooper Depo. 5, 7.

Ordinarily, the reasonableness of an accommodation is an issue for the jury. Schmidt, supra, 864 F.Supp. at 997. Here, evidence has been adduced which raises a question of fact as to whether the other positions discussed with Plaintiff, but never given him, constituted a reasonable accommodation.

(d) Defendant Should Have Accepted Plaintiff's DOT Vision Waiver And Is Not Excused From Making A Reassignment.

Defendant argues that under the reasonable accommodation requirement there would be no requirement

to accept Plaintiff's waiver "[a]nd, as a matter of law, there was no duty to consider Plaintiff for other positions if he did not ask for any accommodation" other than acceptance of his DOT waiver. Def's Memo. at 9. Defendant's position is simply contrary to the law.

The ADA imposes on an employer an affirmative duty to make a reasonable accommodation for its employees' physical impairments. See 29 C.F.R. §1630, App. §1630.2(o); Braun v. American International Health, 315 Or. 460, 470, 846 P.2d 1151 (1993) (interpreting Oregon disability discrimination law, which is also patterned on the Rehabilitation Act, and citing 41 C.F.R. §60-741.6(d) (1992)). Likewise, reassignment is a potentially reasonable accommodation, although in general it "should only be considered when accommodation within the individual's current position would pose an undue hardship. 29 C.F.R. §1630, App., §1630.2(o). Thus, Defendant had an affirmative duty to look for a means to accommodate Plaintiff in his truck driver position and if that proved to be an undue hardship, to consider reassignment.

In the present case, there is an additional reason why Defendant had an affirmative duty to offer a suitable reassignment and make reasonable accommodations in that new position. Here Plaintiff was an injured worker. Pl. Depo. 36-37. As an injured worker, once Plaintiff was released to work he was entitled to his old job or a suitable alternative if his old job was not available. ORS 659.415; ORS 659.420. Plaintiff was released unconditionally to work on November 3, 1992. Pl. Depo. 91, 252; Ex. 29. However, instead of returning Plaintiff to work, Defendant sent him to its doctor for an examination, which revealed he had 20/200 vision in his left eye and needed a DOT vision waiver. Pl. Depo. 92, 94, 95, Ex. 17. Thus, at the time Defendant learned of Plaintiff's physical disability that required

reasonable accommodation, it also had a legal obligation to return him to his former position or a suitable alternative. Since Defendant was subject to both legal obligations at the same time, it had a legal obligation to make reasonable accommodation so Plaintiff could return to his job as a truck driver or to offer him a suitable alternative position with reasonable accommodation of his impairment in the alternative position.

Here, there is evidence that Defendant's personnel manager did not know of any undue hardship to Defendant that would have existed by accepting a vision waiver. Norris Depo. 6, 7, 8, 24. Mr. Sturgill believed the undue hardship to be the "liability." Sturgill Depo. 37. In the absence of any undue hardship and of an individualized assessment of the safety risks, Defendant could not avoid its reasonable accommodation requirement by simply refusing to accept the waiver.

Furthermore, Defendant cannot avoid both obligations by simply asserting there was no requirement to accept the waiver and since Plaintiff did not ask for any other accommodation, no requirement to offer any reassignment. Acceptance of that position would gut disability discrimination law. This is especially true since the waiver Defendant refused to accept was developed to help satisfy the requirements of the ADA and Defendant never conducted an individualized assessment of Plaintiff to determine if he could safely drive a truck with his vision impairment.

Defendant is not entitled to judgment as a matter of law.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment on Plaintiff's ADA claim should be

denied.

Respectfully submitted,

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050

s/ Scott N. Hunt
SCOTT N. HUNT, OSB #92343

Attorneys for Plaintiff

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PLAINTIFF'S CONCISE STATEMENT OF MATERIAL
FACTS IN DISPUTE

Pursuant to Local Rule 220-9, Plaintiff submits this statement of material facts in dispute:

1. Whether Plaintiff had a safe driving record, without being involved in an accident in which he was at fault and was considered to be a safe driver by Defendant and not a safety hazard. Pl. Depo. 150-151, 153-57, 159-61, 165, 234-235, 280-281; Sturgill Depo. 32, 38, 47-48; Riddle Depo. 5, 6, 14-15; Ex. 3; Ex. 20.

2. Whether Plaintiff had a record of having driven safely for Defendant with his vision impairment, amblyopia, which he has had since birth. See citations to Plaintiff's Concise Fact Number 1; Pl. Depo. 42-43, 46; Sturgill Depo. 34-35, 36; Ex. 22; Ex. 24; Aff. of Beatrice Michel.

3. Whether Plaintiff who has a physical impairment of amblyopia is otherwise qualified for the position of truck driver. See citations to Plaintiff's Concise Fact Number 2; Pl. Depo. 95; Riddle Depo. 11-13; Sturgill Depo. 24, 32, 52, 57; Ex. 17; Ex. 34; Ex. 35; Ex. 43.

4. Whether Plaintiff was an injured worker entitled to reinstatement rights and as a qualified individual with a disability entitled to reasonable accommodation in his former position or a suitable alternative position. Pl. Depo. 36-37, 91, 92, 94, 95, 252; Ex. 17; Ex. 29.

5. Whether Defendant's acceptance of Plaintiff's DOT vision waiver would have constituted reasonable accommodation, and if so, whether there was a safety risk or an undue hardship excusing Defendant's non-acceptance of Plaintiff's DOT vision waiver. See citations to Plaintiff's Concise Fact Number 3 and 4; Pl. Depo. 69-70, 75; Sturgill Depo. 9, 10, 20, 22, 24, 25, 37, 56; Riddle Depo. 13, 15-18;

31, 43; Norris Depo. 6-10, 24, 32; Ex. 25; Ex. 26; Ex. 29; Ex. 32; Ex. 34; Ex. 36; Ex. 37; Ex. 39; Ex. 40.

6. Whether there was an individualized assessment of Plaintiff's potential safety risk and of any reasonable accommodation to alleviate that risk. See specific citations listed under Plaintiff's Concise Fact Number 5; Sturgill Depo. 22, 23, 30; Riddle Depo. 9, 10, 11, 22, 24.

7. Whether Defendant's conduct regarding reassignment of Plaintiff constituted a reasonable accommodation. Pl. Aff.; Pl. Depo. 4-5, 77-81, 85-87, 101; Sturgill Depo. 22, 23, 30, 31; Riddle Depo. 27, 40, 42-43; Riddle Depo. 9, 10, 11, 22, 23, 24, 55; Cooper Depo. 5, 7; Ex. 41.

8. Whether Defendant's explanation for why the truck hostler job was withdrawn is pretextual. See specific citations under Plaintiff's Concise Fact Number 5, 6, and 7; Pl. Aff.; Pl. Depo. 262-64; Sturgill Depo. 25, 26, 28, 32-33, 36, 48, 52, 57, 58; Riddle Depo. 15, 16-18, 29, 57-58; Norris Depo. 9-10, 24, 34; Ex. 1; Ex. 16; Ex. 21; Ex. 22; Ex. 23; Ex. 24, Ex. 43; Ex. 47; Ex. 48; Aff. of Beatrice Michel; citations to Plaintiff's Concise Fact Number 3.

Respectfully submitted,

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050

s/ Scott N. Hunt
SCOTT N. HUNT, OSB #92343

Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF PLAINTIFF

I, HALLIE KIRKINGBURG, being first duly sworn,
depose and say:

1. I am the Plaintiff herein.
 2. The vision in my left eye has always been the same. It was not deteriorating in the 1990-1992 time period.
 3. That vision does not interfere with my ability to drive a truck.
 4. I never turned down the yard hostler position.
- DATED this 26th day of September, 1995.

s/ Hallie Kirkingburg
HALLIE KIRKINGBURG, Plaintiff

SUBSCRIBED AND SWORN TO before me this 26
day of September, 1995.

s/ Wanda F. Kinkade
Notary Public of Oregon
My Commission Expires: 12-15-96

(Certificate of Service omitted in printing)

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AFFIDAVIT OF RICHARD C. BUSSE

I, RICHARD C. BUSSE, being first duly sworn,
depose and say:

1. I am Plaintiff's attorney.
2. Attached are true and correct copies of the deposition excerpts and deposition exhibits referenced in Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

DATED this 29th day of September, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorney for Plaintiff

SUBSCRIBED AND SWORN TO before me this
_____ day of September, 1995.

s/ Cathy A. Blanc
Notary Public for Oregon
My Commission Expires: 4-24-99

(Certificate of Service omitted in printing)

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AFFIDAVIT OF BEATRICE MICHEL, O.D.

I, BEATRICE MICHEL, O.D., being first duly sworn, depose and say:

1. I am a doctor of optometry and am Plaintiff's treating doctor of optometry.
2. I am aware that Mr. Kirkingburg was a truck driver for Albertson's in 1992, and am generally familiar with the duties of that position.
3. The attached, Ex. 24, is true and correct. Mr. Kirkingburg's vision was 20/200 in both 1991 and 1992 when I saw him. His condition was stable and had not worsened in the years I had seen him at the Tillamook Vision Center.

DATED this 26 day of September, 1995.

s/ Beatrice Michel
BEATRICE MICHEL, O.D.

SUBSCRIBED AND SWORN TO before me this 26 day of September, 1995.

s/ Cheryl D. Huff
Notary Public of Oregon
My Commission Expires: 07-09-99

(Certificate of Service omitted in printing)

EXHIBIT 24

Tillamook Vision Center

Eric Halperin, O.D.

Beatrice Halperin Michel, O.D.

November 9, 1992

To Whom It May Concern:

RE: KIRKINGBURG, Hallie (SS# 270-34-2921)

Mr. Kirkingburg returned to my office today for a vision examination to provide the information needed for his vision waiver. I last saw Mr. Kirkingburg January 24, 1991 for a comprehensive vision examination.

At both visits, Mr. Kirkingburg's visual acuities with spectacle correction were 20/20 right eye and 20/200 left eye. His current glasses provided his best spectacle correction. Posterior and anterior ocular health was within normal limits for both eyes.

The reduced acuity in the left eye is due to amblyopia (ICD-9 368.0). Amblyopia is low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease. In Mr. Kirkingburg's case the amblyopia is caused by a longstanding left eye turn (exotropia ICD-9 378.10). Amblyopia is said to exist if the vision is 20/30 or worse with best correction.

Mr. Kirkingburg has had amblyopia in the left eye since childhood. Mr. Kirkingburg's visual condition is stable and has not worsened since his last vision examination and is not expected to change in the future.

As a licensed doctor of optometry, my opinion is that Mr.

Kirkingburg can easily perform the driving tasks required. He has normal visual acuity (20/20) in the right eye, and the amblyopia in the left eye will not interfere with his ability to drive.

If further information or clarification is necessary please contact me by phone to facilitate resolution of this matter.

Sincerely,

s/ Beatrice Michel

Beatrice Michel, O.D.

102 Stillwell • Tillamook • Oregon • 97141 • (503) 842-5568

(Caption omitted in printing)

MOTION FOR LEAVE TO FILE AN AMENDED
MOTION FOR SUMMARY JUDGMENT

Pursuant to FRCP 15(a) and Local Rule 120-2, Defendant Albertsons respectfully requests that this Court allow it to file an Amended Motion for Summary Judgment and Memorandum in Support to correct certain typographical and clerical errors. A copy of the Amended Motion for Summary Judgment is attached hereto as Exhibit 1.

Counsel for plaintiff has been notified regarding this motion and has no objection thereto.

The Court has verbally granted this motion. Therefore, the original Amended Motion for Summary Judgment and Memorandum in Support is being filed simultaneously herewith.

Dated this 2nd day of October, 1995.

Respectfully submitted,

CORBETT GORDON & ASSOCIATES

s/ Corbett Gordon

By: Corbett Gordon, OSB #82009

Of Attorneys for Defendant

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AMENDED MOTION FOR SUMMARY
JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Albertsons, Inc. moves the Court for summary judgment in its favor on the Plaintiff's claim. In support of this motion, Defendant relies upon its Memorandum in Support of Defendant's Motion for Summary Judgment, the Plaintiff's deposition testimony (attached to the Affidavit of Michael V. Tom as Exhibit A); the deposition testimony of Theodore Sturgill, Charles Norris, and Frank Riddle (attached as Exhibits B, C, D, respectively to Affidavit of Michael V. Tom); Affidavit of Scott Jardine, Affidavit of Dona Pike King, Affidavit of Tammy Polk, and Affidavit of Vada Winn and attached Exhibits filed simultaneously herewith. The original copies of the Affidavit of Dona Pike King was previously filed with this Court with Defendant Albertsons' original Motion for Summary Judgment and the Affidavit of Diana Saucedo has been withdrawn from this Amended Motion for Summary Judgment.

The court has verbally granted Defendant Albertsons leave to file this Amended Motion and Memorandum in Support.

DATED this 2nd day of October, 1995.

Corbett Gordon & Associates

s/ Corbett Gordon

Corbett Gordon, OSB #82009

Attorneys for Defendant

(Certificate of Service omitted in printing)

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MEMORANDUM IN SUPPORT OF AMENDED MOTION
FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Hallie Kirkingburg brought this action against Defendant Albertsons, Inc. ("Albertsons") pursuant to the Americans with Disabilities Act, 29 U.S.C. §12110 et. seq. Plaintiff applied for and was hired as an over-the-road truck driver for Albertsons, working out of Albertsons' warehouse in Portland, Oregon. After approximately one year driving for Albertsons, Plaintiff fell out of his parked truck onto his head. He spent approximately one year recovering from the resulting head injury.

Upon Plaintiff's release to return to work following the compensable injury, Albertsons subjected Plaintiff to a physical examination. Albertsons discovered that Plaintiff did not meet the U.S. Department of Transportation ("DOT") vision requirements. As such, Albertsons regarded Plaintiff as unable to perform the essential function of his job with or without reasonable accommodation.

Plaintiff alleges that he was denied reasonable accommodation and was discriminated against by Albertsons in one or more of the following particulars: 1) Albertsons did not wait a reasonable period of time to allow Plaintiff to obtain a vision waiver; 2) Albertsons would not allow Plaintiff to return to work as a driver even with a vision waiver; and/or 3) Albertsons failed and refused to reasonably accommodate Plaintiff by reassigning Plaintiff to other suitable work. Plaintiff states that his visual acuity is 20/200 in his left eye and alleges that Albertsons regarded Plaintiff as having a physical impairment on this account.

Albertsons moves for summary judgment in its favor on the ground that Mr. Kirkingburg was not "otherwise

qualified" to perform the job of truck driver with or without reasonable accommodation.

II. STATEMENT OF FACTS¹

Plaintiff was hired as a truck driver on August 21, 1990 at the Portland Distribution Center for Albertsons (Exhibit 6 to Kirkingburg Deposition). Plaintiff's employment was terminated on November 20, 1992 by Transportation Manager Ted Sturgill, and Personnel Manager Charles Norris (Exhibit 9 to Kirkingburg Deposition, at pp. 1-2). Dr. Douglas Eubanks, D.O., determined that the Plaintiff did not meet the minimum vision requirements under the DOT standards on November 6, 1992 (Exhibit 31 to Kirkingburg Deposition, at p. 2). The termination action was memorialized in a writing, which stated Mr. Kirkingburg failed the DOT physical of November 6, 1992 (Exhibit 9 to Kirkingburg Deposition, at p. 2).

While Plaintiff was an employee of Albertsons, he was DOT certified twice by different medical examiners. Plaintiff's medical examination dated August 18, 1990, showed that the Plaintiff had 20/25 vision in the right eye and 20/70 in the left eye, and the medical examiner certified that Plaintiff met the requirements under the Motor Carrier Safety Regulations, 49 C.F.R. §391.41-391.49 (Exhibit 31 to Kirkingburg Deposition). Plaintiff's medical examination form of February 5, 1991, showed Plaintiff had 20/25 vision in the right eye and 20/100 in the left eye, and the medical examiner certified that Plaintiff again met the requirements

¹ Attached as exhibits to the Affidavit of Michael V. Tom filed herewith, Albertsons submits pertinent excerpts and exhibits from depositions as follows: Exhibit A - Kirkingburg deposition and exhibits thereto; Exhibit B - Sturgill deposition and exhibits thereto; Exhibit C - Norris and exhibits thereto; Exhibit D - Riddle deposition. Albertsons also files herewith the Affidavits of Dona Pike King, Scott Jardine, Tammy Polk and Vada Winn.

under the Motor Carrier Safety Regulations 49 C.F.R. §391.41-391.49. (Exhibit 31 to Kirkingburg Deposition, at p. 4.) Plaintiff testified that he was born with vision in his left eye of 20/200 and that it has always been that way (Kirkingburg Deposition at 43, 95, 103-04, 275, 287). Historically, Albertsons has deferred to the medical conclusions of its examining physicians, as evidenced by their completion of the DOT certification cards (Affidavit of Jardine; Sturgill Deposition at 24, 34).

Albertsons' company policy states that all drivers are to be recertified when they are returning from a long term injury (Sturgill Deposition at 49, 52). When Plaintiff returned from an approximately one year long absence due to a compensable injury, he was asked to recertify with a physical examination from the Eubanks Clinic on November 6, 1992 (Sturgill Deposition at 49; Riddle Deposition at 30).

At all times, Plaintiff insisted on returning to work as a driver (Norris Deposition at 17-18). The only accommodation he suggested was that Albertsons should accept a vision waiver from the DOT (Affidavit of King). Albertsons has never accepted DOT waivers (Affidavit of King; Affidavit of Jardine). Albertsons' consistent policy has been only to employ drivers who met the minimum DOT standards (Affidavit of King; Affidavit of Jardine; Riddle Deposition at 11-13, 60).

Plaintiff filed a grievance with his Union, Teamsters Local 305, which resulted in a conference board denial of reinstatement (Affidavit of Winn). While Albertsons did not believe he was otherwise qualified to drive, Albertsons did consider other jobs for Plaintiff (Affidavit of King). Plaintiff admits he was offered the position of yard hostler (moving trailers) at the Distribution Center (Kirkingburg Deposition at 77) and the position of Tire Man (Kirkingburg Deposition at 84-85). The position of yard hostler was withdrawn after it was offered to (but not accepted by) Plaintiff when Albertsons became concerned that the position required DOT

certification (Riddle Deposition at 55). Plaintiff refused the tire mechanic position (Kirkingburg Deposition at 85-87; Norris Deposition at 18).

The decision to terminate Plaintiff from his job as a driver was made by Frank Riddle, the General Manager of the Distribution Center, and corporate personnel (Riddle Deposition at 11-12). The termination was based on a review of Plaintiff's DOT file, which established that Plaintiff did not meet the DOT minimum requirements as established in the DOT manual (Riddle Deposition at 11-12). Albertsons did not accept waivers from DOT minimum requirements because Albertsons had concern for the safe operation of its vehicles (Riddle Deposition at 13, 60; Affidavit of Jardine). Frank Riddle directed Theodore Sturgill, the Transportation Manager, to terminate Plaintiff because he could not pass the minimum DOT requirements (Sturgill Deposition at 22-24).

Albertsons has both a policy and a consistent practice of not accepting any DOT waivers (Affidavit of Jardine; Riddle Deposition at 47-48). Albertsons has always considered excellent visual acuity to be an essential function of the job of truck driver (Affidavit of Jardine; Affidavit of King).

III. DISCUSSION

1. Elements of a prima facie case under the Americans with Disabilities Act.

The Americans with Disabilities Act states that no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a). To establish a prima facie ADA case, the Plaintiff must show: he is disabled (includes being regarded as disabled under 29

C.F.R. §1630.2(3)) within the meaning of the ADA; he is qualified, with or without reasonable accommodation; he is able to perform the essential functions of the job; and that the employer terminated him because of his disability. Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1386 (1994) (this is a Rehabilitation Act case. The ADA defines a disability in substantially the same terms as the Rehabilitation Act defines an individual with "handicaps", now an individual with a "disability". Chandler at 1391.; Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990) (Rehabilitation Act case).

2. As a matter of law, Plaintiff is not an otherwise qualified individual with a disability under the Americans with Disabilities Act.

Under the Americans with Disabilities Act of 1990, the general rule against discrimination in employment states that no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regards to discharge or other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a). The term "qualified individual with a disability" is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. §12111(8) (emphasis added). Consideration is to be given to the employer's judgment as to what functions of a job are essential, which include employers' written job descriptions, that are considered evidence of the essential functions of the job. 42 U.S.C. §12111(8). (See Exhibit 2 to Riddle Deposition, at p. 3, which states Albertsons' drivers are required to comply with all DOT, Interstate Commerce Commission and Company safety rules). Albertsons considers the DOT minimum requirements for interstate truck driving an essential requirement to perform the function of

interstate driving (Affidavit of Jardine; Affidavit of King). When Plaintiff was terminated, he did not qualify to drive under the DOT minimum vision requirements and thus could not perform the function of driving commercial over-the-road trucks. Although Plaintiff subsequently acquired a waiver from the vision requirements, Albertsons is under no legal obligation to accept waivers. Upon returning to work from a compensable injury, the Plaintiff was unable to pass the medical examination that would qualify him to resume driving interstate trucks (Exhibit 31 to Kirkingburg Deposition, at p. 3). Dr. Douglas Eubanks found, on November 6, 1992, that Plaintiff did not meet the DOT requirements. Thus, the Plaintiff was not otherwise qualified to perform the essential function of his position as a commercial interstate truck driver.

The issue of whether one is "otherwise qualified" is explained in Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1386 (1994) and Etheridge v. State of Alabama, 860 F.Supp. 808 (M.D. Ala. 1994). In Chandler, the Fifth Circuit applies a two part inquiry to determine whether an individual is "otherwise qualified" for a given job under the Rehabilitation Act of 1973². It is noteworthy that the burden lies with the plaintiff to show that he is otherwise qualified. Chandler at 1394. The first inquiry is whether the individual could perform the essential functions of the job. *Id.* at 1393. Under Etheridge (ADA claim), the Alabama District Court required the individual satisfy the requisite skill, experience, education and other job-related requirements of the employment position. Etheridge at 818 (citing 29 C.F.R. §1630.2(m)). Under 29 C.F.R. §1630.2(n), "essential functions" are defined as the fundamental job duties and

² Congress intended that the case law established under the Rehabilitation Act be used in deciding ADA cases. 42 U.S.C. §12117(b).

those that an employee must be able to perform. Etheridge at 816. Albertsons has considered good vision and DOT qualifications as essential for driving trucks (Affidavit of Jardine). The functions may be essential because the reason the position exists is to perform that function. 29 C.F.R. §1630.2(n)(2)(I).

Plaintiff's medical examinations reveal that he never qualified under the DOT requirements³ to drive a commercial vehicle, although various examiners were "certifying" him as "qualified" (Exhibit 31 to Kirkingburg Deposition, at pp. 1, 3-4). Plaintiff's vision condition became an issue when, on November 6, 1992, Dr. Douglas Eubanks brought to Albertsons' attention the fact that the Plaintiff was not qualified under the DOT vision requirements because the visual acuity in his left eye was 20/200. As the examining physician, Dr. Douglas Eubanks found that the Plaintiff did not meet the Motor Carrier Safety Regulations. (Exhibit 31 to Kirkingburg Deposition, at p. 3).

If the Plaintiff satisfies the first inquiry, the Court should make a second inquiry to determine whether any reasonable accommodation can be made by the employer which would enable the employee to perform the functions of the job. Chandler at 1394 (citing Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991)); Etheridge at 818. The Fifth Circuit echoes a United States Supreme Court decision when it states that if a reasonable accommodation will not eliminate a significant safety risk, a handicapped person is not otherwise qualified. Chandler at 1395 (citing School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987)). The Fifth Circuit has held as a matter of law that a driver with insulin dependent diabetes or with vision

³ Of relevance, 49 C.F.R. §391.41(10) requires the individual have distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses.

impaired to the extent discussed in 49 C.F.R. §391.41⁴ presents a genuine substantial risk that he could injure himself or others. Chandler at 1395. The Fifth Circuit echoes the sentiment expressed in an earlier unpublished opinion, "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident." Chandler at 1395 (citing Collier v. City of Dallas, No. 86-1010, slip op. at 3 (5th Cir. 1986) (unpublished)).

For purposes of this Motion, even if Albertsons conceded that Plaintiff were an "otherwise qualified" individual with a disability, there are no practical means to accommodate the Plaintiff to allow him to return to a commercial truck driver's position. Putting an interstate truck driver with a left eye vision of 20/200 would risk injury to the Plaintiff, co-workers, and the public. Under Schmidt v. Safeway Inc., 864 F.Supp. 991, 998 (D. Or. 1994, Panner), an employer is not required to place an otherwise qualified individual with a disability in a position that poses an inherent risk of injury to the employee, co-workers, or public. In Chandler, the court stated that if a reasonable accommodation would not eliminate a significant safety risk, a handicapped person is not otherwise qualified. Chandler at 1395 (citing School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987)).

Albertsons, in fact, took steps to accommodate Plaintiff by offering him other positions of employment as a yard hostler and a tire man. (Kirkingburg Deposition at 77, 84-85). Plaintiff did not accept the position of yard hostler and it was withdrawn when Albertsons became concerned

⁴49 C.F.R. §391.41(10) requires that a person have distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses. Plaintiff does not so qualify (Exhibit 31 to Kirkingburg Deposition, at p. 2)

because the position required DOT certification (Riddle Deposition at 55). Plaintiff refused the tire mechanic position. (Norris Deposition at 18; Kirkingburg Deposition at 87). On August 25, 1995, Plaintiff applied for a warehouse job. (Affidavit of Polk). Albertsons through WorkForce Dynamics, Inc. encouraged Plaintiff to apply for a warehouse position on September 28, 1994 (Exhibit 40 to Kirkingburg Deposition). Plaintiff interviewed for the position on September 14, 1995, but did not qualify for the position because he could not pass the ergonomics test administered on September 25, 1995. (Affidavit of Polk). The ergonomics test is a validated test which assesses the physical skills and abilities of an applicant to determine if the individual is able to perform the essential functions of the warehouse job. (Affidavit of Polk).

For purposes of this Motion, even if Albertsons conceded that Plaintiff was an otherwise qualified individual with a disability, and that Albertsons could reasonably accommodate him, there would be no requirement to accept his DOT waiver and place him in a driving position because he would pose a significant threat and liability as an over-the-road driver. And, as a matter of law, there was no duty to consider Plaintiff for other positions if he did not ask for any accommodations except to insist that Albertsons waive the minimum driving requirements.

In the present case, Plaintiff has failed to present any evidence that he was otherwise qualified for the position of interstate truck driver. Plaintiff was not able to perform the essential functions of the position because he did not meet DOT minimum requirements at the time of his termination. As a result he was not "otherwise qualified", with or without reasonable accommodation. An employer is not required to accept an accommodation which is not safe. Even if Plaintiff were "otherwise qualified," there were no reasonable accommodations that would allow him to return safely to his position as a driver. When Albertsons attempted to

accommodate Plaintiff by offering a position as a tire mechanic, Plaintiff refused the offer. Albertsons is entitled to summary judgment as a matter of law, and this Court should grant summary judgment in Albertsons' favor on this claim.

DATED this 2nd day of October, 1995.

Respectfully submitted,
CORBETT GORDON & ASSOCIATES
s/ Corbett Gordon
By: Corbett Gordon, OSB #82009
Attorneys for the Defendant

(Certificate of Service omitted in printing)

(Caption omitted in printing)

CONCISE STATEMENT OF FACTS

STATEMENT OF FACTS¹

1. Plaintiff was hired as a truck driver on August 21, 1990 at the Portland Distribution Center for Albertsons (Exhibit 6 to Kirkingburg Deposition).

2. Plaintiff's employment was terminated on November 20, 1992 by Transportation Manager Ted Sturgill, and Personnel Manager Charles Norris (Exhibit 9 to Kirkingburg Deposition, at pp. 1-2). Dr. Douglas Eubanks, D.O., determined that the Plaintiff did not meet the minimum vision requirements under the DOT standards on November 6, 1992 (Exhibit 31 to Kirkingburg Deposition, at p. 2). The termination action was memorialized in a writing, which stated Mr. Kirkingburg failed the DOT physical of November 6, 1992 (Exhibit 9 to Kirkingburg Deposition, at p. 2).

4. While Plaintiff was an employee of Albertsons, he was DOT certified twice by different medical examiners. Plaintiff's medical examination dated August 18, 1990, showed that the Plaintiff had 20/25 vision in the right eye and 20/70 in the left eye, and the medical examiner certified that Plaintiff met the requirements under the Motor Carrier Safety Regulations, 49 C.F.R. §391.41-391.49 (Exhibit 31 to Kirkingburg Deposition). Plaintiff's medical examination form of February 5, 1991, showed Plaintiff had 20/25 vision in the right eye and 20/100 in the left eye, and

¹ Attached as exhibits to the Affidavit of Michael V. Tom filed herewith, Albertsons submits pertinent excerpts and exhibits from depositions as follows: Exhibit A - Kirkingburg deposition and exhibits thereto; Exhibit B - Sturgill deposition and exhibits thereto; Exhibit C - Norris and exhibits thereto; Exhibit D - Riddle deposition. Albertsons also files herewith the Affidavits of Dona Pike King, Scott Jardine; Vada Winn and Tammy Polk.

the medical examiner certified that Plaintiff again met the requirements under the Motor Carrier Safety Regulations 49 C.F.R. §391.41-391.49. (Exhibit 31 to Kirkingburg Deposition, at p. 4.) Plaintiff testified that he was born with vision in his left eye of 20/200 and that it has always been that way (Kirkingburg Deposition at 43, 95, 103-04, 275, 287). Historically, Albertsons has deferred to the medical conclusions of its examining physicians, as evidenced by their completion of the DOT certification cards (Affidavit of Jardine; Sturgill Deposition at 24, 34).

5. Albertsons' company policy states that all drivers are to be recertified when they are returning from a long term injury (Sturgill Deposition at 49, 52).

6. When Plaintiff returned from an approximately one year long absence due to a compensable injury, he was asked to recertify with a physical examination from the Eubanks Clinic on November 6, 1992 (Sturgill Deposition at 49; Riddle Deposition at 30).

7. At all times, Plaintiff insisted on returning to work as a driver (Norris Deposition at 17-18).

8. The only accommodation he suggested was that Albertsons should accept a vision waiver from the DOT (Affidavit of King).

9. Albertsons has never accepted DOT waivers (Affidavit of King; Affidavit of Jardine). Albertsons' consistent policy has been only to employ drivers who met the minimum DOT standards (Affidavit of King; Affidavit of Jardine; Riddle Deposition at 11-13, 60).

10. Plaintiff filed a grievance with his Union, Teamsters Local 305, which resulted in a conference board denial of reinstatement (Affidavit of Winn).

11. While Albertsons did not believe he was otherwise qualified to drive, Albertsons did consider other jobs for Plaintiff (Affidavit of King). Plaintiff admits he was offered the position of yard hostler (moving trailers) at the Distribution Center (Kirkingburg Deposition at 77) and the

position of Tire Man (Kirkingburg Deposition at 84-85). The position of yard hostler was withdrawn after it was offered to (but not accepted by) Plaintiff when Albertsons became concerned that the position required DOT certification (Riddle Deposition at 55).

12. Plaintiff refused the tire mechanic position (Kirkingburg Deposition at 85-87; Norris Deposition at 18).

13. The decision to terminate Plaintiff from his job as a driver was made by Frank Riddle, the General Manager of the Distribution Center, and corporate personnel (Riddle Deposition at 11-12). The termination was based on a review of Plaintiff's DOT file, which established that Plaintiff did not meet the DOT minimum requirements as established in the DOT manual (Riddle Deposition at 11-12). Albertsons did not accept waivers from DOT minimum requirements because Albertsons had concern for the safe operation of its vehicles (Riddle Deposition at 13, 60; Affidavit of Jardine). Frank Riddle directed Theodore Sturgill, the Transportation Manager, to terminate Plaintiff because he could not pass the minimum DOT requirements (Sturgill Deposition at 22-24).

14. Albertsons has both a policy and a consistent practice of not accepting any DOT waivers (Affidavit of Jardine; Riddle Deposition at 47-48). Albertsons has always considered excellent visual acuity to be an essential function of the job of truck driver (Affidavit of Jardine; Affidavit of King).

DATED this 2nd day of October, 1995.

Respectfully submitted,

CORBETT GORDON & ASSOCIATES

s/ Corbett Gordon

By: Corbett Gordon, OSB #82009

Attorneys for the Defendant

(Certificate of Service Omitted from Printing)

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AFFIDAVIT OF MICHAEL V. TOM

I, Michael V. Tom, being first duly sworn, depose and say:

1. I am an associate with the law firm Corbett Gordon & Associates and I am one of the attorneys representing defendant Albertsons in this matter.

2. Corbett Gordon took the deposition of plaintiff, Hallie Kirkingburg in this matter on August 1, 1995 and August 22, 1995. I have attached true and accurate copies of excerpts from Mr. Kirkingburg's deposition transcript and Exhibits as Exhibit A.

3. Plaintiff took the deposition of Theodore Mitchell Sturgill on August 25, 1995. I have attached true and accurate copies of excerpts from Mr. Sturgill's deposition transcript as Exhibit B.

4. Plaintiff took the deposition of Charles Anthony Norris on August 25, 1995. I have attached true and accurate copies of excerpts from Mr. Norris' deposition transcript as Exhibit C.

5. Plaintiff took the deposition of Frank D. Riddle on August 29, 1995. I have attached true and accurate copies of excerpts from Mr. Riddle's deposition transcript as Exhibit D.

s/ Michael V. Tom
Michael V. Tom

THIS INSTRUMENT was acknowledged before me on this 2nd day of October, 1995.

s/ William D. Burt
Notary Public for Oregon
My Commission Expires: 9-19-97

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AFFIDAVIT OF DONA PIKE KING

I, Dona Pike King, being first duly sworn, depose and say:

1. I am the Labor Relations Manager for Albertsons located at 250 Parkcenter Blvd., Boise, Idaho, a position I have held since January, 1993. I make this affidavit on the basis of personal knowledge.

2. I have been employed with Albertsons since January, 1992. As long as I have been employed with Albertsons, Albertsons has considered excellent vision acuity to be an essential function of the job of truck driver.

3. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons has both a policy and a consistent practice of not accepting any Department of Transportation Waivers.

4. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons consistent policy has been to employ drivers who meet or exceed the minimum Department of Transportation vision standards.

5. While Albertsons did not believe he was otherwise qualified to drive, Albertsons did consider the position of yard hostler for the Plaintiff, Mr. Hallie Kirkingburg. That position was offered to him through his Union representative on May 17, 1993. Mr. Kirkingburg was also offered the position of Tire Mechanic, which he rejected.

s/ Dona Pike King
Dona Pike King

THIS INSTRUMENT was acknowledged before me on this 15th day of September, 1995.

s/ Mary D. McCourt
Notary Public for Oregon
My Commission Expires: 7-12-98

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF TAMMY POLK

I, Tammy Polk, being first duly sworn, depose and say:

1. I am the Personnel Manager for Albertsons located at the Portland Distribution Center located at 17505 NE San Rafael, Portland, Oregon. I make this affidavit on the basis of personal knowledge.
2. I have been employed with Albertsons since July of 1992 and as Personnel Supervisor at the Portland Distribution Center since May, 1994. On September 25, 1995, I became the Personnel Manager and as such, I am the custodian of personnel records. Hallie Kirkingburg did not submit applications for employment to the Albertsons Distribution Center in Portland, Oregon, between November 20, 1992 and August 25, 1995. Mr. Kirkingburg did apply for a warehouse position at the Distribution Center on August 25, 1995.
3. Mr. Kirkingburg was interviewed for the warehouse position on September 14, 1995. Mr. Kirkingburg was being considered for the warehouse position in the Portland Distribution Center, but did not qualify for the position as he could not pass the ergonomics test administered on September 25, 1995. The ergonomics test is a validated test which assesses the physical skills and abilities of an applicant to determine if the individual is able to

perform the essential functions of the warehouse job.

s/ Tammy E. Polk
TAMMY POLK

THIS INSTRUMENT was acknowledged before me on this 26th day of September, 1995.

s/ Lorna Dufur
Notary Public for Idaho
My Commission Expires: 1-9-97

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF SCOTT JARDINE

I, Scott Jardine, being first duly sworn, depose and say:

1. I am the Corporate Director of Transportation for Albertsons located at 250 Parkcenter Blvd., Boise, Idaho, a position I have held since December, 1992. I make this affidavit on the basis of personal knowledge.
2. I have been employed with Albertsons twice beginning in 1974. As long as I have been employed with Albertsons (approximately twenty years), Albertsons has considered excellent vision acuity to be an essential function of the job of truck driver.
3. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons has had both a policy and a consistent practice of not accepting any Department of Transportation Waivers because of safety and liability concerns.

4. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons has deferred to examining physicians when they certify that drivers meet or exceed DOT standards.

5. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons' consistent policy has been to employ drivers who meet or exceed the minimum Department of Transportation vision standards.

s/ Scott Jardin
Scott Jardine

THIS INSTRUMENT was acknowledged before me on this 15th day of September, 1995.

s/ Melisa G. Pearson
Notary Public for Idaho
My Commission Expires: 9-28-00

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

Case No.: 95-549-PA Date of Proceeding: 10/3/95

Case Title: Kirkingburg v. Albertson's Inc.

Presiding Judge: Owen M. Panner

Courtroom Deputy: Margaret Hunt, 326-4190

Reporter: None

Tape No:

DOCKET ENTRY:

Record of order granting defendant Albertsons' motion for leave to file amended motion for summary judgment (#28).

cc: All counsel

DOCUMENT NO: 37
CIVIL MINUTES

(Caption omitted in printing)

PLAINTIFF'S ADDITIONAL CONCISE STATEMENT
OF MATERIAL FACTS IN DISPUTE

Pursuant to Local Rule 220-9, Plaintiff submits this additional statement of material facts in dispute in response to Defendant's Concise Statement of Facts, which was filed after Plaintiff filed his Concise Statement of Material Facts in Dispute. A copy of Plaintiff's statement of facts is attached hereto as Exhibit A.

To decrease the risk of confusion, Plaintiff will number his additional Material Facts In Dispute starting with number 9, since his concise Statement of Material Facts In Dispute was numbered 1 through 8. All citations in support of these facts in dispute are to materials attached to Plaintiff's Concise Statement of Facts In Dispute.

9. Whether the DOT minimum physical requirements were part of the essential job function or DOT certification was actually an essential requirement of the job.

Compare citations to Defendant's Concise Statement of Facts No. 13 to Riddle Depo. 11-13; Sturgill Depo. 24, 32, 57; Exs. 17, 34, 43; Pl. Depo. 95 (Defendant's doctor told him he needed a vision waiver); Pl. Depo. 69-70; Ex. 25; Sturgill Depo. 9, 20, 25 (decision not to accept waiver made by corporate legal).

10. Whether Defendant's consistent policy has been to employ only drivers who met the minimum DOT standards and not accept waivers or whether employing Plaintiff with his vision impairment did not raise any "red flags" or concerns to Defendant.

Compare citations to Defendant's Concise Statement of Facts Nos. 9 and 14 to Strugill Depo. 25, 26, 28, 32-33, 34-35, 36, 48, 49, 52; Pl. Depo. 42-43, 46, 262-64; Exs. 22, 23, 24, 47; Affidavit of Beatrice Michel.

11. Whether Defendant has always considered

excellent visual acuity to be an essential function of the job in question.

Compare citations to Defendant's Concise Statement of Facts No. 14 to citations to Plaintiff's Additional Facts in Dispute Nos. 9 and 10.

12. Whether Plaintiff was willing to return to work other than in his former position.

Compare citations to Defendant's Concise Statement of Facts No. 7 to Pl. Depo. 4 (thought he had yard hostler job), 5, 77, 78, 79, 80, 81; Pl. Affidavit (he never turned down the yard hostler position); Riddle Depo. 40, 41, 42-43, 55, 57-58; Sturgill Depo. 31; Ex. 41.

DATED this 11th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

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DEFENDANT'S REPLY MEMORANDUM

In his opposition to defendant's Motion for Summary Judgment, plaintiff argues that material factual issues exist with regard to whether he was "otherwise qualified" for a driving position, and whether defendant made reasonable efforts to accommodate his alleged disability.¹ In effect, plaintiff's claim that he was "qualified" to drive a commercial motor vehicle amounts to an argument that defendant was legally obligated to accept plaintiff's participation in an experimental vision-waiver program as conclusive proof of his "qualification." Unfortunately for plaintiff, this argument ignores the nature and history of the Federal Highway Administration's (FHWA) waiver program, and is unsupported by any relevant authority.

¹Plaintiff suggests in his memorandum in opposition (page 11) that "Defendant does not challenge that Plaintiff's vision impairment qualifies as a physical impairment under the ADA ***." That, however, does not make the "impairment" a protected "disability" under the ADA. That law defines a "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 USC §12112(a). An impairment that prevents an individual from working only at one particular job (e.g., driving a commercial motor vehicle) is not a "disability" for ADA purposes. 29 CFR §1630.2(j)(3)(I). See, e.g., Jasany v. U.S. Postal Service, 755 F2d 1244, 1249 n. 3 (6th Cir 1985) (under federal Rehabilitation Act, "[a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one"); Hallums v. Coca-Cola Bottling Co., 874 SW2d 30 (Tenn App 1993) (employee's monocular vision was not a "handicap" under state disability discrimination law, because it did not "substantially" limit a major life activity, even though it precluded him from obtaining a DOT medical certification; relying on federal Rehabilitation Act authority). Should this case go to trial, plaintiff will of course bear the burden of proving all elements of his ADA claim, including the existence of a covered "disability."

1. **Plaintiff is not "qualified" because he cannot meet the established federal vision standards for commercial motor vehicle drivers.**

The ADA "recognizes employers' obligations to comply with requirements of other laws that establish safety and health standards." EEOC Technical Assistance Manual, Section 4.6. As the EEOC itself has stated:

The ADA does not override health and safety requirements established under other Federal laws. If a standard is required by another Federal law, the employer must comply with it and does not have to show that the standard is job related and consistent with business necessity.

For example: An employee who is being hired to drive a vehicle in interstate commerce must meet safety requirements established by the U.S. Department of Transportation. ***

Id. at Section 4.6.1 (emphasis added). The vision requirements established by the DOT for operators of commercial motor vehicles include "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses ***." 49 CFR §391.41(b)(10). It is undisputed that plaintiff does not meet the standard set by that regulation, which has been in effect at all material times in this case.

Instead, plaintiff argues that he is qualified because he is eligible for a waiver of the standard set by 49 CFR

§391.41(b)(10) under an experimental FHWA study. What the Court must remember is that the waiver program has not revised, much less deleted, the visual acuity standards set by the applicable federal regulation. Rather, it is a mechanism by which the FHWA is attempting to determine whether and to what extent the regulation incorporating the visual acuity standard should be revised in the future. To accept plaintiff's argument that he should be considered "qualified" to drive by virtue of his eligibility to participate in this study would (wrongly) compel the employer to take part in an FHWA experiment, at the risk of harm to itself and to the traveling public. Nothing in the ADA requires an employer to become such an unwilling "guinea pig."

The history of the vision waiver program is briefly as follows: On February 28, 1992, the FHWA published an "advance notice of proposed rulemaking," inviting public comment on "the need, if any, to amend its driver qualification requirements relating to the vision standard," i.e., 49 CFR §391.41(b)(10). 57 Fed. Reg. 6793. On March 25, 1992, before the time for public comment had expired, the FHWA announced the implementation of a temporary vision waiver program for certain drivers, including those who were blind in one eye. 57 Fed. Reg. 10295. Following a storm of criticism, the agency published a third notice inviting public comment "on its intent to waive its vision requirements for drivers that meet certain conditions," and stating that "the proposed waiver program will enable the FHWA to conduct a study comparing a group of experienced visually deficient drivers with a control group of experienced drivers who meet the Federal vision requirements." 57 Fed. Reg. 23370 (June 3, 1992). Subsequently, the FHWA instituted the program to issue temporary waivers. 57 Fed. Reg. 31458 (July 16, 1992). The waiver program was promptly challenged by a number of insurance companies, law enforcement agencies, and public interest groups. Advocates for Highway Safety v. Federal Highway

Administration, 28 F3d 1288 (DC Cir 1994).

In the Advocates case, the federal Court of Appeals for the District of Columbia Circuit threw out the FHWA waiver program, holding that the agency had violated its mandate to grant waivers from established physical qualification standards only where it found that such waivers were "not contrary to the public interest and *** consistent with the safe operation of commercial motor vehicles." 28 F3d at 1293, citing 49 USC App. §2505(f). The court noted that the FHWA had admitted (in its final notice implementing the waiver program) that it had no empirical data "to establish a link between vision disorders and commercial motor vehicle safety," and that the waiver program itself was intended to provide this data by allowing the agency to conduct a study that would "provide the empirical data necessary to *** permit the FHWA to properly evaluate its current vision requirements *** and, if necessary, establish a new vision requirement ***." 57 Fed. Reg. at 31458. In plain English, the FHWA was proposing to use the waiver program as an experiment to see how safe (or unsafe) drivers who did not meet the current vision standards in 49 CFR §391.41(b)(10) might be.

The appellate court pointed out that, "[s]ince their establishment in the late 1930's, the federal government's vision standards have been successively tightened" and that "[t]he current regulations 'prescribe "absolute" vision standards with virtually no possibility of a waiver.'" 28 F3d at 1293. Therefore,

*** the vision waiver program represents a significant departure from the FHWA's prior policy, a departure the agency bears a special burden in justifying. *** [T]he agency initiated a program to issue temporary waivers to visually impaired drivers in order to procure the hard evidence needed to determine the effect of visual deficiencies on safety. Yet,

before it may grant a waiver, the Safety Act requires the agency to "determine[] that such waiver ... is consistent with the safe operation of commercial motor vehicles. *** Its determination that the waiver program will not adversely affect the safe operation of CMV's is devoid of empirical support in the record ***.

Id. at 1293-94 (emphasis added). The court concluded by vacating the FHWA's adoption of the waiver program.

Following the decision in the *Advocates* case, the FHWA published on October 6, 1994, a notice of its determination "to extend, for thirty days, waivers issued to certain vision-impaired drivers as part of a study instituted in July, 1992" in order to "gather information and data to determine whether there should be a change in the current vision standards for operators of commercial motor vehicles ***." 59 Fed. Reg. 50887. The agency proposed to extend this "study" to no later than March 31, 1996, subject to public comments received within the next fifteen days. *Id.* at 50891. This notice expressly stated that "[T]he agency *is not* accepting applications for vision waivers at this time." *Id.*

On November 17, 1994, the FHWA published a "Notice of Final Determination and change in research plan." 59 Fed. Reg. 59386 (emphasis added). This notice continued existing temporary waivers until March 31, 1996, subject to certain reporting and monitoring conditions for maintaining the waivers. In this notice, the agency acknowledged that its vision waiver "study as presently fashioned has some problems *** [and] that its group of waived drivers may include some subpar performers who individually may present an unacceptable risk to safety." *Id.* at 59388. In particular, the FHWA admitted that problems with monitoring of the study had led to underreporting of the number of fatal accidents involving drivers with vision waivers, and that in fact the rate of fatal accidents for this

group had been higher than previously believed. *Id.* at 59388-89. The agency also conceded that "the study, as currently designed, will not produce, by itself, sufficient evidence upon which to develop a new vision standard" to replace the current one in 49 CFR §391.41(b)(10). *Id.* at 59388.

In short, the FHWA waiver program does not represent (and, by the agency's own admission, will not support) a change in the established federal vision standards for commercial motor vehicle drivers. It is no more or less than an experimental study aimed at providing some data on the safety (or lack thereof) of people who do not meet the current vision standards. Whether this experiment will prove a success, a failure, or something in between is not now known and will not be known for some time. What is clear is that, as of this date and as of the date the plaintiff was terminated, the actual federal requirements for visual acuity are those set out in the existing regulation -- standards that this plaintiff admittedly does not meet.²

Plaintiff's argument that defendant should have made an "individualized assessment" of his visual impairment (Plaintiff's Memorandum, page 14) is incorrect. Defendant was entitled to rely on the established visual acuity standards in the FHWA's physical qualification regulations in disqualifying plaintiff. See *Buck v. U.S. Dept. of Transportation*, 56 F3d 1406 (DC Cir 1995) (FHWA was not

²Plaintiff's reliance on *Sarsycki v. United parcel Service*, 862 F Supp 336 (WD Okla 1994) is misplaced. That case did not deal with vision waivers, and the court's comments on the FHWA vision waiver program, quoted in Plaintiff's Memorandum at page 13, were dicta. Moreover, the *Sarsycki* court apparently did not have the benefit of the District of Columbia Circuit Court's opinion in the *Advocates for Highway Safety* case, cited above, which invalidated the original FHWA vision-waiver program. Finally, the plaintiff there apparently had not been driving commercial motor vehicles and therefore was not technically subject to the physical qualification standards in the FHWA's regulations.

required to make individualized assessment of deaf truck drivers who did not meet established physical qualification standards in 49 CFR §391.41(b)(11)); Ward v. Skinner, 943 F2d 157 (1st Cir 1991) (FHWA was not required to make individualized assessment of driver who did not meet physical qualification standards of 49 CFR §391.41 because of history of epilepsy). That the FHWA has undertaken an experimental vision-waiver study cannot change this conclusion when the FHWA itself has not even proposed, much less implemented, any changes to the visual acuity standards in its regulations.³

The ADA allows employers to rely on established federal health and safety standards in setting minimum qualifications for jobs. The established federal standard for visual acuity for commercial motor vehicle operators is set out in 49 CFR §391.41(b)(10). Defendant has adopted this standard as a minimum qualification for its truck drivers. Plaintiff does not meet this standard and therefore is not

³Nor is it relevant that the plaintiff had been erroneously certified in the past by a number of doctors and one nurse practitioner as physically qualified to drive under the FHWA's regulations. Evidently plaintiff was not alone in having "slipped through" the certification process, since the FHWA's October 6, 1994 notice admitted that there had been a number of drivers who "were operating, unwittingly or otherwise, in contravention of the existing interstate standard." 59 Fed. Reg. at 50888. In plaintiff's case, one of his doctors testified in deposition he had continued to certify the plaintiff as qualified to drive in DOT physicals he conducted in 1988, 1990, and 1992, knowing that the plaintiff did not meet the FHWA's visual acuity standards, because the plaintiff had been driving for some years. Deposition of Dr. Glen Sayler at 10-11, 13-15. Attached as exhibits to the Affidavit of Michael V. Tom filed herewith, Albertsons submits pertinent excerpts from depositions as follows: Exhibit A - Kirkingburg Deposition; Exhibit B - Dwiggin Deposition; Exhibit C - Norris Deposition; Exhibit D - Riddle Deposition; Exhibit E - Sayler Deposition. Clearly, the employer cannot be held responsible for this kind of deliberate "fudging," nor does it alter the fact that the plaintiff does not meet the standards currently set out in 49 CFR §391.41(b)(10).

"otherwise qualified" for the job of truck driver. In order for the Court to find that plaintiff is "qualified," the Court would have to hold that defendant is under some legal obligation to participate in the FHWA vision-waiver experiment. Plaintiff has not identified anything in the ADA that would impose such an obligation. The FHWA notice of November 17, 1994 makes it quite clear that the purpose of the waiver program is to provide some data to indicate just how safe these drivers are, and also makes it clear that previous FHWA monitoring of the drivers' performance had left much to be desired. The ADA does not mandate employer participation in such federal experiments, and certainly does not require this employer to accept the risks of liability presented by employing a driver who is legally blind in one eye.

2. Plaintiff has failed to raise a material issue of fact as to defendant's efforts to accommodate him in another job.

Even assuming for purposes of this Motion that plaintiff were an individual with a "disability" as that term is defined by the ADA, the record establishes that defendant did everything required of it in the way of "reasonable accommodation" by trying to place plaintiff in another job. Plaintiff's argument that defendant should have accommodated him in November 1992 (the time of his termination) by giving him a leave of absence to obtain a vision waiver (Plaintiff's Memorandum, page 15) is simply a restatement of his legally unsupported contention that the employer was obligated to join in the FHWA's vision-waiver study.

In addition, plaintiff's claim that the defendant was obligated to find another job for him after it learned that he was physically disqualified from the job he had been doing has been repeatedly rejected by the courts. See School Board of Nassau County v. Arline, 480 US 273, 289 n. 19, 107 S Ct

1123, 94 L Ed2d 307 (1987) (even under duty of reasonable accommodation imposed by the Rehabilitation Act, employers "are not required to find another job for an employee who is not qualified for the job he or she was doing"); Myers v. Hose, 50 F3d 278, 284 (4th Cir 1995) (under the ADA, "the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position"); Guillot v. Garrett, 970 F2d 1320, 1327 (4th Cir 1992) ("[A]n employer is not required as a matter of reasonable accommodation to transfer or reassign an employee who is not otherwise qualified for the position he then holds"). In Buckingham v. United States, 998 F2d 735, 740 (9th Cir 1993), a Rehabilitation Act case, the Ninth Circuit was careful to note that, while the plaintiff's request for a transfer to the same job in a different location may have been a reasonable accommodation, "Buckingham is not asking for the type of job transfer that the Supreme Court has suggested [in Arline] might not be required under the Act. *** Buckingham is not asking for a different job."

Moreover, the record establishes that the defendant did offer and/or urge the plaintiff to apply for other jobs, even after he had been terminated. (Dwiggins Depo pp. 4-5; Norris Deposition at 18; Riddle Deposition at 55; Affidavit of Polk (original previously submitted with Defendant's Amended Motion for Summary Judgment)). Plaintiff argues that he did not have to accept the tire mechanic job that defendant offered him because it paid less than his former position (Plaintiff's Memorandum at page 17). Even the EEOC (which, as the cases cited above indicate, has gone well beyond the courts in suggesting that reasonable accommodation may include the offer of another job) does not take the position that a plaintiff has a "right" to the job of his choice, or to a job that is as good as or better than his old position. See EEOC, Technical Assistance Manual, Section

3.10.5 ("An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no positions vacant or soon to be vacant for which the employee is qualified ***"). Here plaintiff admits that he was offered and rejected the tire mechanic job. There is not dispute of fact that plaintiff was offered a job as yard hostler and that the job was withdrawn. While plaintiff admits that he was offered this job, he denies that he rejected it before it was withdrawn. He does not deny however, that he never accepted the job.

It is apparent from his own testimony that the plaintiff is not going to be happy with any job other his former one; he testified in deposition that he told Charlie Norris that he did not want the tire mechanic job, even though the defendant offered to train him, after Mr. Norris told him that the job would not eventually lead to a return to a driving position. (Kirkingburg Depo. pp. 86-87). Unfortunately, plaintiff simply does not have the visual acuity to meet the federal standards for that job, standards on which the employer is entitled to rely. While all parties can agree that it is a blessing that plaintiff did not have a major accident during the time he was driving in violation of the federal standards, that does not support a claim that the employer should be legally required to "push its luck" (and plaintiff's) by putting the plaintiff back on the road behind the wheel of a large commercial vehicle. Nor has plaintiff identified anything in the ADA that would compel the employer to put its equipment, its employees, its business, and the safety of the motoring public on the line in order to take part in a federal experiment.

For all of the foregoing reasons, defendant is entitled to judgment as a matter of law.

DATED this 13th day of October, 1995.

Corbett Gordon & Associates

s/ Michael V. Tom OSB#93440 for
Corbett Gordon
Corbett Gordon, OSB #82009
Attorney for Defendant

(Certificate of Service omitted in printing)

(Caption omitted in printing)

PLAINTIFF'S MOTION TO SUBMIT ADDITIONAL
MATERIALS IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court to receive as additional materials in opposition to Defendant's motion for summary judgment Attachments A and B hereto, excerpts from the EEOC Technical Assistance Manual and excerpts from the deposition of Beatrice Michel.

This motion is supported by the attached Affidavit of Richard C. Busse.

DATED this 18th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF RICHARD C. BUSSE

I, RICHARD C. BUSSE, being first duly sworn,
depose and say:

1. I am Plaintiff's attorney.
2. Attached hereto as Attachment A is a copy of excerpts from the EEOC Technical Assistance Manual.
3. Attached hereto as Attachment B is a copy of excerpts from the deposition of Beatrice Michel.

DATED this 18th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE

SUBSCRIBED AND SWORN TO before me this
18th day of October, 1995.

s/ Cathy A. Blanc
Notary Public of Oregon
My Commission Expires: 04-24-99

Attachment A

Qualification Standards and Selection Criteria

- **The Job Accommodation Network (JAN)** a free national consultant service, available through a toll-free number, helps employers make individualized accommodations.
- **ABLEDATA** a computerized database of disability related products and services, conducts customized information searches on worksite modifications, assistive devices and other accommodations.
- **The President's Committee on Employment of People with Disabilities** provides technical information including publications with practical guidance on job analysis and accommodations.
- **Governors' Committees on Employment of People with Disabilities** in each State, allied with the President's Committee, are local resources of information and technical assistance.

These and many other sources of specialized technical assistance are listed in the *Resource Directory*. The Index to the Directory will be helpful in locating specific types of assistance.

1100,140 IV. Establishing Nondiscriminatory Qualification Standards and Selection Criteria

4.1 Introduction

The ADA does not prohibit an employer from establishing job-related qualification standards, including education, skills, work experience, and physical and mental standards necessary for job performance, health and safety.

The Act does not interfere with an employer's authority to establish appropriate job qualifications to hire people who can perform jobs effectively and safely, and to hire the best qualified person for a job. ADA requirements are designed to assure that people

with disabilities are not excluded from jobs that they can perform.

ADA requirements apply to all selection standards and procedures, including but not limited to:

- education and work experience requirements;
- physical and mental requirements;
- safety requirements;
- paper and pencil tests;
- physical or psychological tests;
- interview questions; and
- rating systems;

4.2 Overview of Legal Obligations

- Qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability must be **job-related and consistent with business necessity**.

- Even if a standard is job-related and consistent with business necessity, if it screens out an individual with a disability on the basis of disability, the employer **must consider** if the individual could meet the standard with a **reasonable accommodation**.

- An employer is not required to lower existing production standards applicable to the quality or quantity of work for a given job in considering qualifications of an individual with a disability, if these standards are uniformly applied to all applicants and employees in that job.

- If an individual with a disability cannot perform a marginal function of a job because of a disability, an employer may base a hiring decision only on the individual's ability to perform the *essential* functions of the job, with or without a reasonable accommodation.

4.3 What is Meant by "Job-Related" and "Consistent with Business Necessity"?

1. Job-Related

If a qualification standard, test or other selection criterion operates to screen out an individual with a disability, or a class of such individuals on the basis of disability, it must be a legitimate measure or qualification for the *specific* job it is being used for. It is not enough that it measures qualifications for a general class of jobs.

For example: A qualification standard for a secretarial job of "ability to take shorthand dictation" is not job-related if the person in the particular secretarial job actually transcribes taped dictation.

The ADA does not require that a qualification standard or selection criterion apply only to the "essential functions" of a job. A "job related" standard or

selection criterion may evaluate or measure all functions of a job and employers may continue to select and hire people who can perform all of these functions. It is only when an individual's disability prevents or impedes performance of marginal job functions that the ADA requires the employer to evaluate this individual's qualifications solely on his/her ability to perform the essential functions of the job, with or without an accommodation.

For example: An employer has a job opening for an administrative assistant. The essential functions of the job are administrative and organizational. Some occasional typing has been part of the job, but other clerical staff are available who can perform this marginal job function. There are two job applicants. One has a disability that makes typing very difficult, the other has no disability and can type. The employer

may not refuse to hire the first applicant because of her inability to type, but must base a job decision on the relative ability of each applicant to perform the essential administrative and organizational job functions, with or without accommodation. The employer may not screen out the applicant with a disability because of the need to make an accommodation to perform the essential job functions. However, if the first applicant could not type for a reason *not* related to her disability (for example, if she had never learned to type) the employer would be free to select the applicant who could best perform all of the job functions.

2. Business Necessity

"Business necessity" will be interpreted under the ADA as it has been interpreted by the courts under Section 504 of the Rehabilitation Act.

Under the ADA, as

under the Rehabilitation Act:

If a test or other selection criterion excludes an individual with a disability because of the disability and does not relate to the essential functions of a job, it is not consistent with business necessity.

This standard is similar to the legal standard under Title VII of the Civil Rights Act which provides that a selection procedure which screens out a disproportionate number of persons of a particular race, sex or national origin "class" must be justified as a "business necessity." However, under the ADA the standard may be applied to an *individual* who is screened out by a selection procedure because of disability, as well as to a class of persons. It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a dis-

ability is screened out by a selection standard.

Disabilities vary so much that it is difficult, if not impossible, to make general determinations about the effect of various standards, criteria and procedures on "people with disabilities." Often, there may be little or no statistical data to measure the impact of a procedure on any "class" of people with a particular disability compared to people without disabilities. As with other determinations under the ADA, the exclusionary effect of a selection procedure usually must be looked at in relation to a particular individual who has particular limitations caused by a disability.

Because of these differences, the federal *Uniform Guidelines of Employee Selection Procedures* that apply to selection procedures on the basis of race, sex, and national origin under Title VII of the Civil Rights Act and other Fed-

eral authorities *do not apply* under the ADA to selection procedures affecting people with disabilities.

A standard may be job-related but not justified by business necessity because it does not concern an essential function of a job.

For example: An employer may ask candidates for a clerical job if they have a driver's license, because it would be desirable to have a person in the job who could occasionally run errands or take packages to the post office in an emergency. This requirement is "job-related," but it relates to an **incidental**, not an **essential**, job function. If it disqualifies a person who could not obtain a driver's license because of a disability, it would not be justified as a "business necessity" for purposes of the ADA.

Further, the ADA requires that even if a qualification standard or selection criterion is *job-related*

and consistent with business necessity, it may not be used to exclude an individual with a disability if this individual could satisfy the legitimate standard or selection criterion with a reasonable accommodation.

For example: It may be job-related and necessary for a business to require that a secretary produce letters and other document on a word processor. But it would be discriminatory to reject a person whose disability prevented manual keyboard operation, but who could meet the qualification standard using a computer assistive device, if providing this device would not impose an undue hardship.

4.4 Establishing Job-Related Qualification Standards

The ADA does not restrict an employer's authority to establish needed job qualifications, includ-

ing requirements related to:

- education;
- skills;
- work experience;
- licenses or certification;
- physical and mental abilities;
- health and safety; or
- other job-related requirements, such as judgment, ability to work under pressure or interpersonal skills.

Physical and Mental Qualification Standards

An employer may establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and fire fighter jobs; security guard jobs) or to protect health and safety.

However, as with other job qualification standards, if a physical or mental qualification standard screens out an individual with a disability or a class

of individuals with disabilities, the employer must be prepared to show that the standard is:

- **job-related and**
- **consistent with business necessity.**

Even if a physical or mental qualification standard is job-related and necessary for a business, if it is applied to exclude an otherwise qualified individual with a disability, the employer must consider whether there is a reasonable accommodation that would enable *this person* to meet the standard. The employer does not have to consider such accommodations in establishing a standard, but only when an otherwise qualified person with a disability requests an accommodation.

For example: An employer has a forklift operator job. The essential function of the job is mechanical operation of the forklift machinery. The job has a physical require-

ment of ability to lift a 70 pound weight, because the operator must be able to remove and replace the 70 pound battery which powers the forklift. This standard is job-related. However, it would be a reasonable accommodation to eliminate this standard for an otherwise qualified forklift operator who could not lift a 70 pound weight because of a disability, if other operators or employees are available to help this person remove and replace the battery.

Evaluating Physical and Mental Qualification Standards Under the ADA

Employers generally have two kinds of physical or mental standards:

1. Standards that may exclude an entire class of individuals with disabilities.

For example: No person who has epilepsy, diabetes, or a heart or back condi-

tion is eligible for a job.

2. Standards that measure a physical or mental ability needed to perform a job.

For example: The person in the job must be able to lift x pounds for x hours daily, or run x miles in x minutes.

Standards that exclude an entire class of individuals with disabilities.

"Blanket" exclusions of this kind usually have been established because employers believed them to be necessary for health or safety reasons. Such standards also may be used to screen out people who an employer fears, or assumes, may cause higher medical insurance or workers' compensation costs, or may have a higher rate of absenteeism.

Employers who have such standards should review them carefully. In most cases, they will not

meet ADA requirements.

The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. An employer is not required to hire or retain an individual who would pose a "direct threat" to health or safety (see below). But the ADA requires an objective *assessment of a particular individual's current ability* to perform a job safely and effectively. Generalized "blanket" exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date medical knowledge and technology, or that are based on fears about future medical or workers' compensation costs, are unlikely to survive a legal challenge under the ADA. (However, the ADA recognizes employers' obligations to comply with Federal laws that mandate such exclu-

sions in certain occupations. [See *Health and Safety Requirement of Other Federal or State Laws* below.]

The ADA requires that:

- Any determination of a direct threat to health or safety must be based on an *individualized* assessment of objective and specific evidence about a particular *individual's* present ability to perform essential job functions, not on general assumptions or speculations about a disability. (See *Standards Necessary for Health and Safety: A "Direct Threat"* below).

For example: An employer who excludes all persons who have epilepsy from jobs that require use of dangerous machinery will be required to look at the life experience and work history of an *individual* who has epilepsy. The individual evaluation should take into account the type of job, the degree of seizure control, the type(s)

of seizures (if any), whether the person has an "aura" (warning of seizure), the person's reliability in taking prescribed anti-convulsant medication, and any side effects of such medication. Individuals who have no seizures because they regularly take prescribed medication, or who have sufficient advance warning of a seizure so that they can stop hazardous activity, would not pose a "direct threat" to safety.

Standards that measure needed physical or mental ability to perform a job

Specific physical or mental abilities may be needed to perform certain types of jobs.

For example: Candidates for jobs such as airline pilots, policemen and firefighters may be required to meet certain physical and psychological qualifications.

In establishing physical

or mental standards for such jobs, an employer does not have to show that these standards are "job related," justified by "business necessity" or that they relate only to "essential" functions of the job. However, if such a standard screens out an otherwise qualified individual with a disability, the employer must be prepared to show that the standard, as applied, *is* job-related and consistent with business necessity under the ADA. And, even if this can be shown, the employer must consider whether this individual could meet the standard with a **reasonable accommodation**.

For example: A police department that requires all its officers to be able to make forcible arrests and to perform all job functions in the department might be able to justify stringent physical requirements for all officers, if in fact they are all required to be available for any duty in an emergency.

However, if a position in a mailroom required as a qualification standard that the person in the job be able to reach high enough to place and retrieve packages from 6-foot high shelves, an employer would have to consider whether there was an accommodation that would enable a person with disability that prevented reaching that high to perform these essential functions. Possible accommodations might include lowering the shelf-height, providing a step stool or other assistive device.

Physical agility tests

An employer may give a physical agility test to determine physical qualifications necessary for certain jobs prior to making a job offer if it is simply an agility test and not a medical examination. Such a test would not be subject to the prohibition against pre-employment medical examinations *if given* to all similarly situated applicants or

employees, regardless of disability. However, if an agility test screens out or tends to screen out an individual with a disability or a class of such individuals because of disability, the employer must be prepared to show that the test is job-related and consistent with business necessity and that the test or the job cannot be performed with a reasonable accommodation.

It is important to understand the distinction between physical agility tests and prohibited pre-employment medical inquiries and examinations. One difference is that agility tests do not involve medical examinations or diagnoses by a physician, while medical examinations may involve a doctor.

For example: At the pre-offer stage, a police department may conduct an agility test to measure a candidate's ability to walk, run, jump, or lift in relation to specific job duties, but it cannot require the

applicant to have a medical screening before taking the agility test. Nor can it administer a medical examination before making a conditional job offer to this person.

Some employers currently may require a medical screening before administering a physical agility test to assure that the test will not harm the applicant. There are two ways that an employer can handle this problem under ADA:

- the employer can request the applicant's physician to respond to a very restricted inquiry which describes the specific agility test and asks, "Can this person safely perform this test?"
- the employer may administer the physical agility test *after* making a conditional job offer, and in this way may obtain any necessary medical information, as permitted under the ADA. (See Chapter VI.)

The employer may find it more cost-efficient to administer such tests only to those candidates who have met other job qualifications.

4.5 Standards Necessary for Health and Safety: A "Direct Threat"

An employer may require as a qualification standard that an individual not pose a "direct threat" to the health or safety of the individual or others, if this standard is applied to all applicants for a particular job. However, an employer must meet very specific and stringent requirements under the ADA to establish that such a "direct threat" exists.

The employer must be prepared to show that there is:

- **significant risk of substantial harm;**
- **the specific risk must be identified;**
- **it must be a current risk, not one that is spec-**

ulative or remote;

- the assessment of risk must be based on objective medical or other factual evidence regarding a particular individual; and
- even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a "direct threat" by *reasonable accommodation*.

Looking at each of these requirements more closely:

1. Significant risk of substantial harm

An employer cannot deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The employer must be prepared to show that there is a **significant risk**, that is, a **high probability of substantial harm**, if the person were employed.

The assessment of risk *cannot be based on mere speculation* unrelated to the individual in question.

For example: An employer cannot assume that a person with cerebral palsy who has restricted manual dexterity cannot work in a laboratory because he/she will pose a risk of breaking vessels with dangerous contents. The abilities or limitations of a particular individual with cerebral palsy must be evaluated.

2. The specific risk must be identified

If an individual has a disability, the employer must identify the aspect of the disability that would pose a direct threat, considering the following factors:

- the **duration** of the risk.

For example: An elementary school teacher who has tuberculosis may pose a risk to the health of chil-

dren in her classroom. However, with proper medication, this person's disease would be contagious for only a two-week period. With an accommodation of two-weeks absence from the classroom, this teacher would not pose a "direct threat."

- the **nature and severity** of the potential harm.

For example: A person with epilepsy, who has lost consciousness during seizures within the past year, might seriously endanger her own life and the lives of others if employed as a bus driver. But this person would not pose a severe threat of harm if employed in a clerical job.

- The **likelihood** that the potential harm will occur.

For example: An employer may believe that there is a risk of employing an individual with HIV disease as a teacher. However, it is medically established that this disease can

only be transmitted through sexual contact, use of infected needles, or other entry into a person's blood stream. There is little or no likelihood that employing this person as a teacher would pose a risk of transmitting this disease.

and

- the **imminence** of the potential harm.

For example: A physician's evaluation of an applicant for a heavy labor job that indicated the individual had a disc condition that might worsen in 8 or 10 years would not be sufficient indication of imminent potential harm.

If a perceived risk to health and safety arises from the behavior of an individual with a mental or emotional disability, the employer must identify the specific behavior that would pose the "direct threat."

3. The risk must be cur-

rent not one that is speculative or remote

The employer must show that there is a *current* risk -- "a high probability of substantial harm" -- to health or safety based on the individual's present ability to perform the essential functions of the job. A determination that an individual would pose a "direct threat" cannot be based on speculation about *future* risk. This includes speculation that an individual's disability may become more severe. An assessment of risk cannot be based on speculation that the individual will become unable to perform a job in the future, or that this individual may cause increased health insurance or workers compensation costs, or will have excessive absenteeism. (See *Insurance*, Chapter VII., and *Workers' Compensation*, Chapter IX.)

4. The assessment of risk must be based on objective medical or other evidence

related to a particular individual

The determination that an individual applicant or employee with a disability poses a "direct threat" to health or safety must be based on objective, factual evidence related to *that individual's* present ability to safely perform the essential functions of a job. It cannot be based on unfounded assumption, fears, or stereotypes about the nature or effect of a disability or of disability generally. Nor can such a determination be based on patronizing assumptions that an individual with a disability may endanger himself or herself by performing a particular job.

For example: An employer may not exclude a person with a vision impairment from a job that requires a great deal of reading because of concern that the strain of heavy reading may further impair her sight.

vide such evidence.

Employers should be careful to assure that assessments of "direct threat" to health or safety are based on current medical knowledge and other kinds of evidence listed above, rather than relying on generalized and frequently out-of-date assumptions about risk associated with certain disabilities. They should be aware that Federal contractors who have had similar disability nondiscrimination requirements under the Rehabilitation Act have had to make substantial back pay and other financial payments because they excluded individuals with disabilities who were qualified to perform their jobs, based on generalized assumptions that were not supported by evidence about the individual concerned.

Examples of Contractor Cases:

- A highly qualified expe-

The determination of a "direct threat" to health or safety must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence. This may include:

- input from the individual with a disability;
- the experience of this individual in previous jobs;
- documentation from medical doctors, psychologists, rehabilitation counselors, physical or occupational therapists, or others who have expertise in the disability involved and/or direct knowledge of the individual with a disability.

Where the psychological behavior of an employee suggests a threat to safety, **factual evidence** of this behavior also may constitute evidence of a "direct threat." An employee's violent, aggressive, destructive or threatening behavior may pro-

rienced worker was rejected for a sheet metal job because of a company's general medical policy excluding anyone with epilepsy from this job. The company asserted that this person posed a danger to himself and to others because of the possibility that he might have a seizure on the job. However, this individual had been seizure-free for 6 years and co-workers on a previous job testified that he carefully followed his prescribed medication schedule. The company was found to have discriminated against this individual and was required to hire him, incurring large back pay and other costs.

- An applicant who was deaf in one ear was rejected for an aircraft mechanic job because the company feared that his impairment might cause a future workers' compensation claim. His previous work record gave ample evidence of his ability to perform the aircraft me-

chanic job. The company was found to have discriminated because it provided no evidence that this person would have been a danger to himself or to others on the job.

- An experienced carpenter was not hired because a blood pressure reading by the company doctor at the end of a physical exam was above the company's general medical standard. However, his own doctor provided evidence of much lower readings based on measurements of his blood pressure at several times during a physical exam. This doctor testified that the individual could safely perform the carpenter's job because he had only mild hypertension. Other expert medical evidence confirmed that a single blood pressure reading was not sufficient to determine if a person has hypertension, that such a reading clearly was not sufficient to determine if a person could perform a particular job, and that hypertension has very

different effects on different people. In his case, it was found that there was merely a slightly elevated risk, and that a remote possibility of future injury was not sufficient to disqualify an otherwise qualified person. (Note that while it is possible that a person with mild hypertension does not have an impairment that "substantially limits a major life activity," in this case the person was excluded because he was "regarded as" having such an impairment. The employee was still required to show that this person posed a "direct threat" to safety.)

"Direct Threat" to Self

An employer may require that an individual not pose a direct threat of harm to his or her own safety or health, as well as to the health or safety of others. However, as emphasized above, such determinations must be strictly based on valid medical analyses or other objective evidence related to this individual,

using the factors set out above. A determination that a person might cause harm to himself or herself *cannot* be based on stereotypes, patronizing assumptions about a person with a disability, or generalized fears about risks that might occur if an individual with a disability is placed in a certain job. Any such determination must be based on evidence of specific risk to a particular individual.

For example: An employer would not be required to hire an individual disabled by narcolepsy who frequently and unexpectedly loses consciousness to operate a power saw or other dangerous equipment, if there is no accommodation that would reduce or eliminate the risk of harm. But an advertising agency could not reject an applicant for a copywriter job who has a history or mental illness, based on a generalized fear that working in this high stress job might trigger a relapse of the individual's

mental illness. Nor could an employer reject an applicant with a visual or mobility disability because of a generalized fear of risks to this person in the event of a fire or other emergency.

5. If there is a significant risk, reasonable accommodation must be considered

Where there is a significant risk of substantial harm to health or safety, an employer still must consider whether there is a reasonable accommodation that would eliminate this risk or reduce the risk so that it is below the level of a "direct threat."

For example: A deaf bus mechanic was denied employment because the transit authority feared that he had a high probability of being injured by buses moving in and out of the garage. It was not clear that there was, in fact, a "high probability" of harm in this case, but the mechanic suggested an effec-

tive accommodation that enabled him to perform his job with little or no risk. He worked in a corner of the garage, facing outward, so that he could see moving buses. A co-worker was designated to alert him with a tap on the shoulder if any dangerous situation should arise.

"Direct Threat" and Accommodation in Food Handling Jobs

The ADA includes a specific application of the "direct threat" standard and the obligation for reasonable accommodation in regard to individuals who have infectious or communicable diseases that may be transmitted through the handling of food.

The law provides that the U.S. Department of Health and Human Services (HHS) must prepare and update annually a list of contagious diseases that are transmitted through the handling of food and the methods by which these

diseases are transmitted.

When an individual who has one of the listed diseases applies for work or works in a job involving food handling, the employer must consider whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through handling of foods. If there is such an accommodation, and it would not impose an undue hardship, the employer must provide the accommodation.

An employer would not be required to hire a job *applicant* in such a situation if no reasonable accommodation is possible. However, an employer would be required to consider accommodating an *employee* by reassignment to a position that does not require handling of food, if such a position is available, the employee is qualified for it, and it would not pose an undue hardship.

In August 1991, the

Centers for Disease Control (CDC) of the Public Health Service in HHS issued a list of infectious and communicable diseases that are transmitted through handling of food, together with information about how these diseases are transmitted. The list of diseases is brief. In conformance with established medical opinion, it does not include AIDS or the HIV virus. In issuing the list, the CDC emphasized that the greatest danger of food-transmitted illness comes from contamination of infected food-producing animals and contamination in food processing, rather than from handling of food by persons with infectious or communicable diseases. The CDC also emphasized that proper personal hygiene and sanitation in food-handling jobs were the most important measures to prevent transmission of disease.

The CDC list of diseases that are transmitted through food handling and

recommendations for preventing such transmission appears in Appendix C.

Health and Safety Requirements of Other Federal or State Laws

The ADA recognizes employers' obligations to comply with requirements of other law's that establish health and safety standards. However, the Act gives greater weight to Federal than to state or local law.

1. Federal Laws and Regulations

The ADA does not override health and safety requirements established under other Federal Laws. If a standard is required by another Federal law, a employer must comply with it and does not have to show that the standard is job related and consistent with business necessity.

For example: An employee who is being hired to drive a vehicle in interstate commerce must meet

safety requirements established by the U.S. Department of Transportation. Employers also must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration (OSHA).

However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other Federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws.

For example: In hiring a person to drive a vehicle in interstate commerce, an employer must conform to existing Department of Transportation regulations that exclude any person with epilepsy, diabetes, and certain other conditions from such a job.

But, for example, if

DOT regulations require that a truck have 3 grab bars in specified places, and an otherwise qualified individual with a disability could perform essential job functions with the assistance of 2 additional grab bars, it would be a reasonable accommodation to add these bars, unless this would be an undue hardship.

The Department of Transportation as directed by Congress, currently is reviewing several motor vehicle standards that require "blanket" exclusions of individuals with diabetes, epilepsy and certain other disabilities.

2. State and Local Laws

The ADA does not override state or local laws designed to protect public health and safety, except where such laws conflict with ADA requirements. This means that if there is a state or local law that would exclude an individual with a disability for a

particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If there is such a "direct threat," the employer also must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer may not rely on the existence of a state or local law that conflicts with ADA requirements as a defense to a charge or discrimination.

For example: A state law that required a school bus driver to have a high level of hearing in both ears without use of hearing aid was found by a court to violate Section 504 of the Rehabilitation Act, and would violate the ADA. The court found that the driver could perform his job with a hearing aid without a risk to safety.

(See further guidance
on Medical Examinations
and Inquiries in Chapter
VI.)

(Certificate of Service omitted in printing)

(Caption omitted in printing)

MOTION TO SUPPLEMENT PLAINTIFF'S MATERIALS
IN OPPOSITION TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Plaintiff moves the Court for an order allowing Plaintiff to supplement his materials with five (5) pages from Defendant's Driver Qualification File on Hallie Kirkingburg, which was received on October 17, 1995. Only one of those pages, page 06, contains new information, although, the others establish that Defendant's doctors were certifying Plaintiff as qualified in 1990 and 1991 despite his condition, and that Defendant had this information in its file.

This motion is supported by the attached Affidavit of Richard C. Busse.

DATED this 18th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF RICHARD C. BUSSE

I, RICHARD C. BUSSE, being first duly sworn, depose and say:

1. I am Plaintiff's attorney.
2. Attached hereto is a copy of excerpts of the Defendant's Driver Qualification File on Hallie Kirkingburg

which was received on October 17, 1995.

DATED this 18th day of October, 1995.

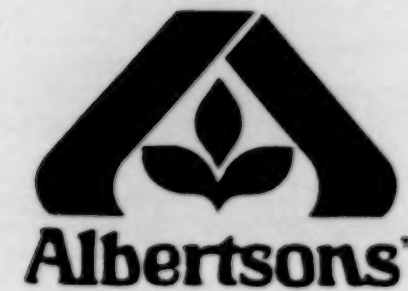
s/ Richard C. Busse
RICHARD C. BUSSE

SUBSCRIBED AND SWORN TO before me this 18th
day of October, 1995.

s/ Cathy A. Blanc
Notary Public of Oregon
My Commission Expires: 4-24-99

(Certificate of Service omitted in printing)

ATTACHMENT



... Miller & K...
... to 542 ...
... 9118 ...
... 20 11 2001 ...
Albertsons'
DRIVER QUALIFICATION FILE



ATTACHMENT



FEDERAL HIGHWAY ADMINISTRATION

391.43

ER

391.43(1)(1)(1)

iver Number: V3369

Effective Date: 02-25-93

iration Date: 02-25-96

201558 OR

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THIS
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cause

CON

The state called said
Hallie had gotten a
waiver from the DOT
AND all he needed was
his card. I told them
we have to sign off on
the waiver for it to
be effective. They sent
us his card because I saw
it. I don't want him to
have it. I told them
to have him follow up
with Bruce if he has a problem.
document

INDIVIDUAL TO WHOM IT
AL MOTOR VEHICLE (CMV) AND
AUTHORIZED ENFORCEMENT

a CMV in interstate commerce under
dic review by the Federal Highway
the waiver stated below will be

(2) Obtain a medical examiner's certificate, from a health care professional, that bears the
statement "Medically unqualified unless accompanied by a Federal vision waiver;"

(3) Provide the medical examiner's certificate upon request of any legally authorized
enforcement official; and

(4) Obtain and display the appropriate driver's license from your State of domicile and
comply with any restrictions placed thereon regarding required use of eyeglasses, mirrors
or other visual aids.

Issued by:

Thomas P. Hyland
(for) E. Dean Carlson
Executive Director
Federal Highway Administration

See reverse side for reporting requirements

- DCF 06

ATTACHMENT



PHYSICAL EXAMINATION FORM
MET'S DEPARTMENT OF TRANSPORTATION REQUIREMENTS

To Be Filled In By Examining Physician (Please Print)

Driver's Name: Hallie K. Kinschup New Certification: 0
Sec. Sec. No: 2-541 Date of Birth: 02-25-93 Age: 25

Yes	No	Yes	No	Yes	No	Yes	No
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Asymptomatic	Asymptomatic	Asymptomatic	Asymptomatic	Asymptomatic	Asymptomatic	Asymptomatic	Asymptomatic
Tuberculosis	Tuberculosis	Tuberculosis	Tuberculosis	Tuberculosis	Tuberculosis	Tuberculosis	Tuberculosis
Diabetes	Diabetes	Diabetes	Diabetes	Diabetes	Diabetes	Diabetes	Diabetes
Cardiovascular	Cardiovascular	Cardiovascular	Cardiovascular	Cardiovascular	Cardiovascular	Cardiovascular	Cardiovascular
Psychiatric	Psychiatric	Psychiatric	Psychiatric	Psychiatric	Psychiatric	Psychiatric	Psychiatric
Other	Other	Other	Other	Other	Other	Other	Other

If answer to any of the above is "yes," explain:

General appearance and consciousness: Good Both 90/60 35 100 meds.

Vision: Both 90/60 35 100 meds.

Hearing: Both 90/60 35 100 meds.

Autonomic tests: Both 90/60 35 100 meds.

Throat: Both 90/60 35 100 meds.

Abdomen: Both 90/60 35 100 meds.

Cardiovascular: Both 90/60 35 100 meds.

Genitourinary: Both 90/60 35 100 meds.

Reflexes: Both 90/60 35 100 meds.

Extremities: Both 90/60 35 100 meds.

Other: Both 90/60 35 100 meds.

Findings: Both 90/60 35 100 meds.

MEDICAL EXAMINER'S CERTIFICATE
(I certify that I have examined)

Hallie K. Kinschup

2-541 Thomas P. Hyland

Hallie K. Kinschup

2-541 Thomas P. Hyland

The following is to be completed only when the vehicle is
operated by a licensed operator.

Date of Examination: 02-25-93

Name of Operator (Print): Thomas P. Hyland

Address of Operator (Print): 2-541

Signature of Operator (Print): Thomas P. Hyland

INSTRUCTIONS ON REVERSE SIDE

ATTACHMENT

MEDICAL EXAMINER'S CERTIFICATE
(Copy for Driver's License)

HALLIE E. KIRKING-BURG
Driver's Name - Print

IN ACCORDANCE WITH THE MOTOR VEHICLE SAFETY REGULATIONS IN CANADA, I, the undersigned, being a duly qualified medical examiner, have examined the above-named person and find that he/she is qualified to drive a motor vehicle.

EXAMINED ONLY WHEN WEARING CORRECTIVE LENSES
EXAMINED ONLY WHEN WEARING A HEARING AID

A COMPLETED EXAMINATION FORM FOR THIS PERSON IS ON FILE IN MY OFFICE AT 2801 1/2 ST. & TRINITY RD. STON

8-18-90
Date of Examination

Robert E. Eubanks, D.O.
Signature of Examiner

X Hallie E. Kirking-Burg
Signature of Driver

X Robert E. Eubanks, D.O.
Signature of Examiner

ATTACHMENT



PHYSICAL EXAMINATION FORM
MEETS DEPARTMENT OF TRANSPORTATION REQUIREMENTS

To Be Filled In By Examining Physician (Please Print)

Driver's Name HALLIE E. KIRKING-BURG New Certification ☐
Sex Male Date of Birth 11-1-22 Registration ☒
Age 67

Health History

<input checked="" type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	<input checked="" type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	<input checked="" type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Asking		Various Stomach		Heart or Lung Disease	
Kidney Disease		Diabetes Mellitus		Seizures or Epilepsy	
Tuberculosis		Mental Disease		Severe Constipation or Indigestion	
Syphilis		Psychiatric Disorder		Any Other Serious Disease	
Gonorrhea		Cardiovascular Disease		Suffering from any other disease	
Quarantine		Gastrointestinal Disease		Remedial action taken	

If answer to any of the above is yes, explain:

h-3511 w-2316

General Appearance and Development: Good

Vision: Far Distance 20/20 Right Eye 20/20 Left Eye 20/20
☐ Without corrective lenses
Evidence of disease of eye: None Right None Left None
Color Test: Normal

Hearing: Horizontal field of vision: Normal Right Normal Left Normal
Right ear Normal Left ear Normal
Diagnosis of injury: None

Automotive test: 1/2 automatic or 1 used to test hearing? None at 500 Hz None at 1,000 Hz None at 2,000 Hz

Throat: None

Heart: None
If organic disease suspected, is it fully compensated? None

Blood Pressure: 110/70 Systolic 70 Diastolic 70
Pulse: Before exercise 70 Immediately after exercise 70
Lungs: Clear

Abdomen: None

Genitourinary: Urination or other disease: None Yes None No None Is this report? None

Reflexes: None

Respiratory: None

Accommodation Right: Normal Left Normal
Knee Jerk: Right Normal Left Normal
Ankle Jerk: Right Normal Left Normal

Extremities: None

Laboratory and Other Special: None

Physician: None

MEDICAL EXAMINER'S CERTIFICATE
(Copy for Driver's License)

HALLIE E. KIRKING-BURG
Driver's Name - Print

IN ACCORDANCE WITH THE MOTOR VEHICLE SAFETY REGULATIONS IN CANADA, I, the undersigned, being a duly qualified medical examiner, have examined the above-named person and find that he/she is qualified to drive a motor vehicle.

EXAMINED ONLY WHEN WEARING CORRECTIVE LENSES
EXAMINED ONLY WHEN WEARING A HEARING AID

A COMPLETED EXAMINATION FORM FOR THIS PERSON IS ON FILE IN MY OFFICE AT 2801 1/2 ST. & TRINITY RD. STON

8-18-90
Date of Examination

Robert E. Eubanks, D.O.
Signature of Examiner

X Hallie E. Kirking-Burg
Signature of Driver

X Robert E. Eubanks, D.O.
Signature of Examiner

The following is to be completed only when the vehicle is a commercial vehicle.

8/18/90
Date of Examination

Robert E. Eubanks, D.O.
Signature of Examiner

Hallie E. Kirking-Burg
Signature of Driver

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

Case No.: 95-549-PA Date of Proceeding: 10/21/95

Case Title: Kirkingburg v. Albertson's Inc.

Presiding Judge: Owen M. Panner

Courtroom Deputy: Margaret Hunt, 326-4190

Reporter: None

Tape No:

DOCKET ENTRY:

Record of order granting plaintiff's motion to supplement materials in opposition to defendant's motion for summary judgment (#44).

PLAINTIFF'S COUNSEL DEFENDANT'S COUNSEL

cc: All counsel

DOCUMENT NO: 46
CIVIL MINUTES

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

Case No.: 95-549-PA Date of Proceeding: 10/21/95

Case Title: Kirkingburg v. Albertson's Inc.

Presiding Judge: Owen M. Panner

Courtroom Deputy: Margaret Hunt, 326-4190

Reporter: None

Tape No:

DOCKET ENTRY:

Record of order granting plaintiff's motion to submit additional materials (#45).

PLAINTIFF'S COUNSEL DEFENDANT'S COUNSEL

cc: All counsel

DOCUMENT NO: 47
CIVIL MINUTES

(Caption omitted in printing)

TRANSCRIPT OF SUMMARY JUDGMENT
PROCEEDINGS

BEFORE THE HONORABLE OWEN M. PANNER

APPEARANCES:

FOR THE PLAINTIFF: Richard C. Busse

FOR THE DEFENDANT: Corbett Gordon
Kathleen Fields
Michael V. Tom

COURT REPORTER: Dennis R. Grube
620 S.W. Main Street
225 U.S. Courthouse
Portland, OR 97205
(503) 326-3113

(October 18, 1995)

PROCEEDINGS

THE COURT: All right. Well, it's the defendant's motion for summary judgment. I don't want you to repeat all of these nice materials that I have. But if you have any last minute strokes of wisdom, why, I would love to hear them.

MS. GORDON: Okay. With that admonition I have almost nothing to say.

THE COURT: All right. Then you can respond to anything Rich has to say if you want to say something.

MS. GORDON: Well, I do have a little. I said almost nothing. I have a little bit.

THE COURT: All right.

MS. GORDON: I think that Your Honor's decision in

Schmidt v. Safeway which we cited in our materials is particularly instructive if you look at the difference between the plaintiff in that case and the plaintiff here.

The plaintiff here has a visual impairment which is not correctable by lenses or any other means. There's no accommodation to his actual disability that can be done. And that plaintiff in the Schmidt case, as Your Honor pointed out, could with treatment overcome his active alcoholism. And you ruled that he should be allowed to have the opportunity to do that. And I just wanted to point out the difference in the disabilities in those two cases, both with driving jobs, both with applicable D.O.T. regulations.

THE COURT: Let me ask you, Corbett, about this regulation that was adopted November 17, 1994 by the Federal Highway Administration in which they provided for waivers from the requirements of the act.

MS. GORDON: Okay.

THE COURT: In other words, assuming this plaintiff has such a waiver, and I assume he does. Is that right?

MR. BUSSE: Yes.

MS. GORDON: Yes, he does.

THE COURT: The facts I think are pretty clear in this case. It seems to me it's probably almost appropriate for a legal decision either for the plaintiff or for the defendant.

As I understand it the plaintiff has a perfectly good safety record in the past, has been driving for the defendant to some extent in the past with a good record, but clearly doesn't qualify under the existing regulations because of his eyesight but does have a waiver from the administration because of his problem with one eye.

Is that the gist of it?

MR. BUSSE: That's correct, Your Honor.

THE COURT: So it seems to me that it's almost a matter of law as to whether or not the ADA requires the defendant to employ this man or whether he's not entitled to because of this waiver.

Am I right about that?

MS. GORDON: That is the argument, Your Honor. And if I could speak to the waiver program. It's a study, it's a three-year study. It's in process. It is to determine whether people with vision impairments, including monocular vision, one-eyed vision, which is essentially what Mr. Kirkingburg has, are safe or as safe or as reasonably safe driving trucks on the highway. And that study's in process. It hasn't been completed. And some of the recent evidence that we submitted in our reply memorandum and cited to there indicates that some of the participants are under-reporting accidents, particularly fatal accidents. And that the safety data and certainly the decision has not been made by the D.O.T. whether these people are safe or not.

And I think it's important to understand that the waiver is only a study, it's not a determination that these people are safe driving. It's an attempt by the Federal Government to determine whether or not by allowing them out there driving to see by their own records whether they are or are not sufficiently safe for the D.O.T. to change it's minimum requirements.

THE COURT: There was some study done after the court case brought by the advocates for highway and auto safety.

MS. GORDON: Right.

THE COURT: And that case by the DC Circuit struck down the waiver of provision, and so they did some studying, or at least put in the record some studies they've done for -- in answer to that case.

MS. GORDON: Well, they reopened, as I understand it, the comment and review period. But the study itself is ongoing. The actual study, the waiver program study, I believe is ongoing until March of 1996 after this trial will be over.

THE COURT: Well, suppose after March of 1996 this study indicates that it's appropriate to grant waivers in

connection with safe drivers and all the other requirements that they put on it. Would you agree the defendant had to hire him?

MS. GORDON: Not necessarily. If the minimum qualifications still stand and it continues to be a waiver program, I'd say the plaintiff's case would be stronger at that point, but I don't think he would be all the way to the barn.

THE COURT: Rich, what do you say?

MR. BUSSE: I think that at the very least -- I think you have to look at the individual, frankly. I don't think that an employer can simply say we have more stringent requirements and exercise a blanket exclusion policy. I think you have to look to see whether or not a reasonable accommodation can allow someone to become a worker that can perform the essential functions of that position.

In this particular case I think that inasmuch as he has driven without incident, inasmuch as he was judged to be safe in the driver road test by Albertson's, inasmuch as he was allowed to become employed as a driver, given the vision from the outset, it didn't comport with the 20/40 Sullen (ph) requirement that was in the D.O.T. What they looked at is whether or not he had a card. That's what they looked at. In 1990, in 1991. And the doctor said you need a vision waiver. Their own doctor said, Dr. Douglas Eubanks, you need a vision waiver. He went to get the vision waiver and then they said no, we're not going to assist you in that, not going to recognize vision waivers.

Well -- and along that line, Judge, if I may, I have some additional materials that I would like to submit since there were some additional materials with the reply, that include a file that was provided October 17th that is the driver qualification file on Mr. Kirkingburg. There's only one page of which that is any new material. But that has to do with a handwritten note and it's in, I believe, Mr. Charlie Norris' handwriting.

MS. GORDON: I don't believe that's accurate.

THE COURT: Wait a minute. Let him finish and then I'll give you a chance.

MS. GORDON: Well, he looked at me for confirmation.

MR. BUSSE: And this is to Mr. Frank Riddle. This is a note that is in Mr. Kirkingburg's file. And it says the clinic called, said how they had gotten a waiver from the D.O.T. and all he needed was his card. It told him we have to sign off on the waiver for it to be effective. They sent us his card. Now, this is the Eubanks Clinic. Because I said we don't want him to have it.

So, again, the doctor for Albertson's is prepared to go ahead with this on the basis of the waiver, and it's the employer that is blocking that.

So -- now, if that is not Mr. Norris' handwriting I would appreciate it if you could identify whose it is.

MS. GORDON: I don't know whose it is and I can't confirm that it's Charlie's.

MR. BUSSE: Well, it's either Charlie's or Mr. Sturgill's's. But it's one of them.

THE COURT: In that event, it was on this letter in his file?

MR. BUSSE: Yes.

THE COURT: Well, I'm going to accept both of the offers for the defendant and for the plaintiff as part of the materials for the summary judgment.

MR. BUSSE: Then in further response, in the -- I have further materials that I would like to present to the Court and it relates to the very issue the Court is asking about.

In the technical assistance manual of the EEOC at page 2 of attachment A, on the right-hand side, it says, further, the ADA requires that even if a qualification standard or selection criterion is job-related and consistent with business necessity -- and that assumes for the sake of argument that the requirement in this case is -- it may not be used to exclude an individual with a disability if this individual could satisfy the legitimate standard or selection criteria with a reasonable

accommodation.

And on the next page it gives the example of a forklift operator where there is a prerequisite of a 70-pound weight requirement. And it says this standard is job-related, however, it would be a reasonable accommodation to eliminate this standard for an otherwise qualified forklift operator who could not lift a 70-pound weight because of a disability.

So in this particular case what that illustrates is that the reasonable accommodation requirement goes both to the essential functions of the job and also to the prerequisites of the position in question.

And, further, on the right side it says --

THE COURT: Still on page 2 or --

MR. BUSSE: Still on page 3.

THE COURT: Three, un-huh.

MR. BUSSE: The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace, but, going further down, the ADA requires an objective assessment of a particular individual's current ability to perform a job safely and effectively. Generalized blanket exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date medical knowledge and technology or that are based on fears about future medical or Workers' Compensation costs are unlikely to survive a legal challenge under the ADA.

Attachment D to these materials is the -- are excerpts from the deposition of Beatrice Michelle that were taken by Ms. Gordon on October 9th. And Dr. Michelle talks about how Mr. Kirkingburg is safe to drive. And it points out that he's been this way all his life and he's made adjustments in his monocular vision. Has been so -- has become used to picking out depth perception from cues that allow him to drive safely. So --

MS. GORDON: I'd like to respond to that.

THE COURT: All right. You may.

MS. GORDON: I brought the entire deposition that Mr. Busse has excerpted. And what Dr. Michelle in fact says is that she did no testing of him individually to see if he could use monocular cues. She's depending on a treatise and she read some experts of that treatise into her deposition. I asked her and it stands at page 22 which Mr. Busse has given you but it continues and I'd like to read it.

THE COURT: All right.

MS. GORDON: Question: Did you and Mr. Kirkingburg discuss the kinds of trucks and the kinds of conditions which he drives? Answer: Not specifically.

Question: Do you know where he was driving that truck? Answer: I do not.

Question: Do you know under what conditions he was driving that truck? Answer: I do not.

Question -- we're now on page 23 which you don't have.

Question: Do you know if he drove at night? Answer: I do not.

Question: Do you know if he left the State of Oregon? Answer: I do not.

Question? Do you know if he ever had more than one trailer? Answer: I do not.

Now, that's relevant I think when you look at the kinds of things that Dr. Michelle talked about as being monocular cues for depth perception. One of the things, and this is at page 18, I asked, does your book or your own personal experience as an optometrist give you any information whether nighttime or low light situations would influence these various conditions you've just described? And one of the things she's talking about is the use of shadows to determine depth perception. And she answers, nighttime or low light definitely influence a person's vision. But whether they influence a person's monocular abilities with regard to depth is not known to me. That's not what I think of when a

person tells me they have problems with nighttime viewing.

Question: But you described something with sunlight reflecting on something? Answer: For shadows.

Question: For shadows? Obviously at night you wouldn't have those cues, would you? Answer: No, but you have of course other cues and you also have overhead lights.

And then she goes on and talks about streetlights and lights coming towards you and lights behind you. But in fact Mr. Kirkingburg was driving around night and day on interstate highways where often, as you know, you don't have lights. There's no shadow cues.

Question on page 19: Are there nonetheless some binocular cues that two-eyed people, people with good sight in both eyes, would rely on for distance depth perception? Answer: Well, I would imagine so. Again, I'm not the expert in this area per se. My understanding is that it is most influential at the near distance and its affect, its impact on the distance is not something I can quantify for you.

To the extent Dr. Michelle gave any individualized test to Mr. Kirkingburg, she gave him the stereoptic near vision depth perception test and found him to be functioning as a monocular person with no depth perception at all.

So to the extent she did any individualized testing with him, she found a complete lack of depth perception. Then she relies on the population in general in monocular people. They to some extent develop this depth perception at distance from these five different areas. One of them is the use of light and shadows. Another one is just the position of near things and far things. She described three other such kinds of cues that people use.

So to the extent that Mr. Busse would have the Court believe that there's been some individualized test that said that Mr. Kirkingburg himself personally is safe on the highway, I don't think we have that.

I'd just like to speak briefly to the other things he mentioned.

The portion of the handwritten note which I can't identify for you. I don't know whose handwriting this is. But he's making the assumptions that's something's coming from a clinic. I don't know. I would ask the Court to look at that yourself. I think it's very unclear where it came from, where the card came from or what it means. I don't know what it means.

THE COURT: Did the company know of the plaintiff's condition in earlier times when he was driving for them?

MS. GORDON: No. In fact, the company had on its records, as Mr. Busse's pointed out to the Court, eye tests. But all they relied on was, as Mr. Busse correctly said, was the card. When he came in with the card it said from the company's clinic.

This is, by the way, not the company's doctor. Dr. Douglas Eubanks is not employed by Albertson's. His clinic is on a contract with Albertson's. And as Mr. Busse knows from the deposition he took of him, it's only one of many employers that they -- and then they have -- it's only 20 percent of their -- their practice is to look at employment cases and the rest of it is just regular patients, so this is not some doctor hired by Albertson's in the sense that you might think.

MR. BUSSE: Might I speak to that point?

THE COURT: Wait until she finishes.

MS. GORDON: Anyway, there are many, many different Doctor Eubanks in that clinic. And the first test was given to him by Dr. Robert Eubanks. And he technically failed it. And yet Dr. Robert Eubanks wrote him out a little card. When he brought his materials back in, all the company looked at was the card. He was certified as passing. They thought he was okay.

The next time he was sent for a D.O.T. check at that same clinic, Dr. Eubanks did the eye check on him and he came back with the card signed. He shouldn't have. In fact he was not safe to drive under the D.O.T. regular minimum standards

at any point when he was employed by Albertson's.

This case has kind of a strange connotation to it. This man never should have been hired to drive again in the first place. And yet he was hired to drive, and he did drive for a year before he had his Workers' Comp accident which was not related to driving and was off for a year.

So he did drive for them for a year. He did fail the vision test three times and they only picked up that it was a failure the third time when Dr. Douglas Eubanks gave him the vision test and noticed for the first time he had failed it.

THE COURT: All right. Mr. Busse.

MR. BUSSE: Thank you. Again, the material that the Court has received, I attached excerpts to his driver qualification file which was presented to me earlier this week. And that file is Albertson's drivers' qualification file and does contain the examinations of Teresa Eubanks on February 5th, 1991 that show him as 20/100 that time. And she gave him a certification card. And this is not his doctor, that's the company's doctor.

And also Robert Eubanks, upon his initial exam on August 18, 1990, he rated him as 20/70 and gave him a card. And that's in the company's file. So they knew, they had this information. So their doctor went ahead and passed him. And what they were concerned -- they knew what his -- or they had information concerning his vision and they had his card.

THE COURT: Okay. Give you two more minutes if you need some more.

MS. GORDON: Okay. I probably don't need a full two minutes.

I want to go back to Rich's point on blanket exclusions. And I think we have a real distinction here with the D.O.T. regulations and EEOC guidelines saying that when there are issues of public safety and the D.O.T. has made a minimum qualification, those can be accepted as blanket exceptions. We cited that in our brief. The materials are there.

So I think we have a very unique area where normally I would agree with Mr. Busse that people need to be looked at. You can't assume all one-armed people can't do something, et cetera, et cetera, or other types of impairments.

In think in areas of public safety you do have the EEOC guidelines guiding the Court and the employers as to what happens there.

That's it.

THE COURT: All right. I will take a little closer look at this and advise you promptly.

MS. GORDON: Thank you.

MR. BUSSE: Thank you, Judge.

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause.

s/ Dennis R. Grube 2-8-96
DENNIS R. GRUBE DATE
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,)	
)	
Plaintiff,	)	CV 95-549-PA
v.)	
)	OPINION
)	Filed Oct. 25, 1995
ALBERTSONS, INC., a)	
Delaware corporation,)	
)	
Defendant.)	

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PANNER, J.

Plaintiff Hallie Kirkingburg brings this action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.

§§ 12101-12213, against his former employer, defendant Albertson's, Inc. Plaintiff, who worked as a truck driver, alleges that defendant illegally terminated him because he is almost blind in one eye.

Defendant moves for summary judgment. I grant the motion.

BACKGROUND

Since childhood plaintiff has had amblyopia in his left eye, "an impairment of vision without detectable organic lesion." Roth v. Lutheran General Hospital, 57 F.3d 1446, 1449 n.3 (7th Cir. 1995). The condition, which cannot be corrected, leaves plaintiff almost blind in his left eye.

Plaintiff became a commercial truck driver in 1979. Defendant hired him in August 1990. Plaintiff has had a clean driving record.

The United States Department of Transportation (DOT) regulations require that interstate commercial truck drivers have "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses" 49 C.F.R. § 391.41(b)(10). Plaintiff has never met this vision standard, but managed to obtain DOT certification anyway. One physician certified plaintiff "[b]ecause he had been driving for many years with this type of vision without any apparent problems." Tom Affidavit, Exh. E, at 16 (Sayler Depo. at 10).

In 1991, plaintiff injured his head when he fell from a truck. When plaintiff was released to work in November 1992, defendant ordered him to undergo a medical examination. On November 6, 1992, Dr. Douglas reported that plaintiff did not meet DOT vision standards.

On November 20, 1992, defendant fired plaintiff.

According to Frank Riddle, a manager for defendant, "[w]e felt it was a matter of safety. We were solely concerned about the safe operation of our vehicles." Plaintiff's Concise Statement at 84 (Riddle Depo. at 13).

Plaintiff applied for a "vision waiver" from the Federal Highway Administration (FHWA), which would give him DOT certification despite his amblyopia. The FHWA started the vision waiver program in 1992, partly because of the national policy "'to facilitate the employment of qualified individuals with disabilities.'" Advocates for Highway and Auto Safety v. Federal Highway Admin., 28 F.3d 1288, 1290 (D.C. Cir. 1994) (quoting 57 Fed. Reg. 31,458, 31,459 (1992)). Applicants needed a valid commercial license and three years' recent experience driving a commercial vehicle without moving violation citations, license suspensions, or driving-related convictions. Id. at 1290-91.

Plaintiff had the requisite clean driving record. He also had a letter from an optometrist, Beatrice Michel, stating that his vision had "not worsened since his last vision examination and is not expected to change in the future." Plaintiff's Concise Statement at 137. Dr. Michel concluded, "As a licensed doctor of optometry, my opinion is that Mr. Kirkingburg can easily perform the driving tasks required. He has normal visual acuity (20/20) in the right eye, and the amblyopia in the left eye will not interfere with his ability to drive." Id. Plaintiff received a vision waiver in early 1993, but defendant refused to accept it.

In August 1994, the United States Court of Appeals for the District of Columbia Circuit struck down the vision waiver program, holding that the FHWA had not shown empirical evidence that the waivers were "'consistent with the safe operation of commercial motor vehicles.'" Advocates for Highway and Auto Safety, 28 F.3d at 1293 (quoting former 49 U.S.C. app. § 2505(f), now codified at 49 U.S.C. § 31136(e)). Because the waiver program was a "significant departure" from the FHWA's previous vision

standards, the agency had a special burden to justify it. *Id.*

In November 1994, the FHWA determined that it would continue vision waivers for the approximately 3,000 drivers in the program, including plaintiff, until March 31, 1996. 59 Fed. Reg. 59,386, 59,387 (1994). The FHWA noted that the fatal accident rate for waived drivers was higher than for other drivers, but considered that unimportant because fatal accidents were rare and the waived drivers involved had not been found to be at fault by the reporting police officers. The agency conceded that information produced by the vision waiver program "will never answer the question as to what the standards should be," and concluded that "[t]he vision standard found at 49 CFR § 391.41(b) (10) will remain in effect until the completion of [future] research and the implementation of any new standard." *Id.* at 59,389-90.

STANDARDS

The court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The court should resolve reasonable doubts about the existence of an issue of material fact against the moving party. *Id.* at 631. The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. *Id.* at 630-31.

DISCUSSION

The ADA prohibits covered employers from discriminating against qualified individuals with disabilities. 42 U.S.C. § 12112(a). To make a prima facie case under the ADA, plaintiff must show that (1) he is a disabled individual; (2) he is qualified, that is, he can perform the essential functions of the job with or without reasonable accommodation; and (3) defendant terminated him because of his disability. *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 996 (D. Or. 1994); *White v. York Int'l Corp.*, 45 F.2d 357, 360-61 (10th Cir. 1995); see also *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) (elements of prima facie case under Rehabilitation Act).

Defendant contends that as a matter of law plaintiff was not a qualified individual. A "qualified individual with a disability" "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court should consider the employer's judgment on which job functions are essential. *Id.*

In deciding whether plaintiff was a qualified individual, the court must first "determine whether [plaintiff] could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue." *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, 114 S. Ct. 1386 (1994). If plaintiff cannot perform the essential functions of the job, the court must then determine "whether any reasonable accommodation by the employer would enable [plaintiff] to perform these functions." *Id.* at 1394.

Defendant argues that because plaintiff did not meet the DOT vision standards, he could not perform an essential function of his job. I agree with defendant that it properly considered meeting DOT minimum requirements essential to

plaintiff's job.

Plaintiff argues that defendant should have reasonably accommodated him by granting him a leave of absence to obtain a vision waiver. However, the ADA does not obligate defendant to employ truck drivers who have received vision waivers. The vision waiver program is a flawed experiment that has not altered the DOT vision requirements.

No reasonable accommodation is possible. "An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Schmidt, 864 F. Supp. at 997; Buck v. United States Dep't of Transportation, 56 F.3d 1406, 1408 (D.C. Cir. 1995) (Rehabilitation Act did not require FHWA to perform individual assessments of truck drivers who failed DOT hearing requirements). If plaintiff were ever involved in an accident, defendant would have difficulty explaining why it hired a driver who could not meet DOT vision requirements. Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993) ("Woe unto the employer who put such an employee behind the wheel"; driver who failed DOT vision standards presented "genuine substantial risk that he could injure himself or others" (quoting Collier v. City of Dallas, No. 86-1010, 798 F.2d 1410, slip op. at 3 (5th Cir. Aug. 19, 1986) (unpublished)), cert. denied, 114 S. Ct. 1386 (1994)).

Plaintiff argues that defendant's policy of rejecting all vision waivers violates the need for individual assessments under the ADA. See Sarsycki v. United Parcel Service, 862 F. Supp. 336, 341 (W.D. Okla. 1994) (ADA requires employer to make individualized assessment); 59 Fed. Reg. 50,887, 50,888 (1994) (FHWA stated that "a preferable standard [to the absolute 20/40 requirement] would allow drivers to demonstrate their individual ability to drive safely, in spite of their vision deficiency."). As plaintiff points out, his driving record is clean and an optometrist has attested that his vision is adequate. However, I conclude that defendant

may rely on the DOT vision standards and need not make an individual assessment of plaintiff's ability to drive. See Buck, 56 F.3d at 1408-09 (DOT deafness standards) and Ward v. Skinner, 943 F.2d 157, 161-64 (1st Cir. 1991) (DOT epilepsy standards), cert. denied, 503 U.S. 959 (1992).

CONCLUSION

Defendant's motion for summary judgment (#24) is granted.

DATED this 25th day of October, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,)	
)	
Plaintiff,	)	CV 95-549-PA
v.)	
	)	ORDER
)	
ALBERTSONS, INC., a)	
Delaware corporation,)	
)	
Defendant.)	

PANNER, J.

Defendant's motion for summary judgment (#24) is granted.

IT IS SO ORDERED.

DATED this 25th day of October, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

(Caption omitted in printing)

MOTION FOR RECONSIDERATION

Plaintiff moves the Court for reconsideration of the Court's Order dated October 25, 1995, because it did not reconsider whether one form of reasonable accommodation would have been to reassign Plaintiff to the yard hostler position (see Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at pp. 5-7 and pp. 15-19) or to some other available and suitable position in lieu of termination (see Plaintiff's Concise Statement of Material Facts in Dispute, Nos. 4, 7 and 8, and Plaintiff's Additional Concise Statement of Material Facts in Dispute, No. 12).

DATED this 26th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RECONSIDERATION

In his Motion for Reconsideration of the Court's Order of October 25, 1995 granting Defendant's Motion for Summary Judgment, plaintiff argues that the Court failed to consider whether defendant was obligated to reassign plaintiff to a yard hostler or other position as a form of reasonable accommodation. This argument is without merit for the following reasons.

Numerous federal courts, including the Ninth Circuit, have indicated that "reasonable accommodation" does not require an employer to find another job for an employee who is not minimally qualified for the position he holds.¹ See Defendant's Reply Memorandum at page 8 and cases cited therein; see also Bradley v. U. of Tex. M.D. Anderson Cancer Center, 3 F3d 922, 925 (5th Cir 1993), cert denied, ___ US ___, 114 S Ct 1071, 127 L Ed2d 389 (1994) (under Rehabilitation Act, where "reasonable accommodation cannot be made for the job he had, [plaintiff's] employer has no duty to reassign Bradley to any particular job ***"); Bates v. Long Island R. Co., 997 F2d 1028, 1035 (2nd Cir), cert denied, ___ US ___, 114 S Ct 550, 126 L Ed2d 452 (1993) (Rehabilitation Act case; "*** reasonable accommodation generally does not require an employer to reassign a disabled employee to a different position"). Therefore, once the Court had concluded that no accommodation could render plaintiff qualified for the driving position he had previously held, it

¹ Mr. Kirkingburg held the job of over-the-road truck driver, not yard hostler. Plaintiff's argument begs the question. The issue here is whether plaintiff could perform his over-the-road driving job with or without reasonable accommodation, not whether some other job -- like that of yard hostler -- could be so modified.

had no need to consider whether he might have been qualified for some other job.

Even the EEOC, which has indicated that reassignment to another job may be a possible form of "reasonable accommodation," has limited that suggestion to other vacant jobs. 29 CFR §1630.2(o)(2)(ii); see also Lawrence v. IBP, ___ F Supp ___, 4 AD Cases 632 (D Kan 1995) (even under EEOC's view, employer would have had no obligation under ADA to transfer disabled employee to a job that was not vacant at the time she was terminated; granting summary judgment for employer). Here, the plaintiff was terminated in November 1992, after the employer learned that he did not meet the FHWA vision standard. The employer suggested the possibility of putting the plaintiff into the yard hostler position in May 1993, several months after his termination, as part of a proposed settlement of his grievance under the labor contract (a grievance that was subsequently denied by a joint conference board). See Sturgill Deposition, Ex 41 (letter dated May 17, 1993 from Dona Pike King to Roy Dwiggin), attached to Plaintiff's Concise Statement of Material Facts in Dispute; Affidavit of Dona Pike King, page 2, attached to Defendant's Memorandum in Support of Amended Motion for Summary Judgment; Affidavit of Vada Winn, Ex. 1, attached to Defendant's Memorandum in Support of Amended Motion for Summary Judgment. There is no evidence that a yard hostler position was vacant at the time plaintiff was terminated. Thus, even assuming the employer's reasonable accommodation obligation encompassed the duty to offer plaintiff another position, and further assuming (contrary to the record) that the plaintiff could have met the minimum standards (including the DOT vision standards) for a yard hostler job, there is absolutely no factual basis to support a finding that such an accommodation could have been made at or about the time the plaintiff was terminated. The Court should not penalize the employer for attempting to resolve the plaintiff's grievance by holding that

the proposed settlement somehow retroactively raised the threshold of the employer's legal obligations under the ADA; such a ruling would make it difficult, if not impossible, for unions and employers to negotiate grievance settlements in cases involving potential ADA claims. Nor is there any legal support for plaintiff's apparent belief that the employer's obligation to reasonably accommodate him should extend long after his termination and (hypothetically) into eternity. In any event, the employer did subsequently offer the plaintiff another job (tire mechanic) for which it even offered to train him, but the plaintiff rejected this job after he was told that it would not lead to a return to a driving position. Kirkingburg Deposition at 86-87, attached to Affidavit of Michael Tom, Defendant's Memorandum in Support of Amended Motion for Summary Judgment.

Plaintiff's reference to "some other available and suitable position" in his motion for reconsideration reveals that he is attempting to import into the federal ADA the language of ORS 659.420, dealing with the reinstatement rights of workers with compensable injuries who are not able to return to their previous jobs. That state statute has nothing to do with the federal law governing this case. While plaintiff may now wish that he had brought such a suit, he has not.

For all of the foregoing reasons, plaintiff's motion for reconsideration is not well-taken and should be denied.

DATED this 6th day of November, 1995.

Corbett Gordon & Associates

s/ Corbett Gordon
Corbett Gordon, OSB #82009
Attorneys for Defendant

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,)	
)	
Plaintiff,	)	CV 95-549-PA
v.)	
	)	ORDER
ALBERTSONS, INC., a)	
Delaware corporation,)	
)	
Defendant.)	

PANNER, J.

Plaintiff Hallie Kirkingburg brings this action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, against his former employer, defendant Albertson's, Inc. Plaintiff alleges that he was a truck driver for defendant and that defendant terminated him because he has 20/200 vision in his left eye.

I granted defendant's motion for summary judgment. Plaintiff now moves for reconsideration, arguing that I should have determined whether reassigning plaintiff to a yard hostler position could have been a reasonable accommodation under the ADA. I deny the motion to reconsider.

Neither party cited controlling Ninth Circuit authority on whether an employer's duty to provide reasonable accommodation includes finding the disabled employee an alternative job. Cf. Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993) (under Rehabilitation Act, reasonable accommodation may include transfer to same position in different location). For this motion, I will assume that reassigning plaintiff to a vacant position is a possible reasonable accommodation. See Benson v. Northwest

Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); but see Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) ("the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position"). However, plaintiff has not shown that the yard hostler position was vacant when he was terminated. Even if the yard hostler position was vacant, driving was an essential function of the job. "An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Schmidt v. Safeway, Inc., 864 F. Supp. 991, 997 (D. Or. 1994); see also Marschand v. Norfolk and Western Ry. Co., 876 F. Supp. 1528, 1543 (D. Ind. 1995) (employer not required to reassign disabled employee to vacant position unless employee is qualified for position).

CONCLUSION

Plaintiff's motion for reconsideration (#50) is denied.

IT IS SO ORDERED.

DATED this 9th day of November, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,)	
)	
Plaintiff,	)	CV 95-549-PA
v.)	
	)	JUDGMENT OF
ALBERTSONS, INC., a	)	DISMISSAL
Delaware corporation,)	
)	
Defendant.)	

Judgment is for defendant. This action is dismissed.

DATED this 15th day of December, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

(Caption omitted in printing)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Hallie Kirkingburg, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on December 15, 1995.

DATED this 22nd day of December, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HALLIE KIRKINGBURG,

Plaintiff-Appellant,

v.

ALBERTSON'S INC., a
Delaware corporation,

Defendant-Appellee.

Court of Appeals
No.

DC No. 95-549-PA
District of Oregon
(Portland)

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF JURISDICTION

1. Basis For District Court Jurisdiction

The district court had federal question jurisdiction over Plaintiff's disability discrimination claim brought under the Americans With Disabilities Act, 29 U.S.C. §12110, et. seq. ("ADA"), pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(a)(4).

2. Basis For Court Of Appeals Jurisdiction

Plaintiff is appealing from the Opinion and the Order

entered in this action October 25, 1995, from the Order entered November 3, 1995, and from the Judgment ordered in this action in favor of Defendant entered on December 15, 1995, Excerpt of Record (hereafter "ER") 211-220, 223-225, 226, which is a final judgment that disposes of all claims with respect to all parties. CR 48, 49, 53, 54. Pursuant to 28 U.S.C. §1291, the judgment is appealable and this Court of Appeals has jurisdiction to consider this appeal. Plaintiff filed his Notice of Appeal on December 22, 1995. ER 227-228. This appeal is timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in granting summary judgment when it held Plaintiff was not a qualified individual under the Americans With Disabilities Act.
2. Whether the district court erred in holding that no reasonable accommodation was possible and specifically that Defendant was not obligated to accept Department of Transportation ("DOT") vision waivers.
3. Whether the district court erred in holding that Defendant could rely on DOT vision standards and need not make an individual assessment of Plaintiff's ability to drive.
4. Whether the district court erred in holding that Defendant was not required to make a reasonable accommodation by transferring Plaintiff to a truck hostler position or some other available and suitable position in lieu of termination, when Plaintiff had a state statutory right to reinstatement as an injured worker.

INTENT TO SEEK ATTORNEYS' FEES

Plaintiff intends to seek reasonable attorneys' fees for this appeal under the authority of 42 U.S.C. §12117, which incorporates the availability of attorneys' fees as provided under Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

Plaintiff, a former employee of Defendant, brought this action in federal court alleging disability discrimination under the Americans With Disabilities Act, 29 U.S.C. §12110, *et. seq.* Defendant moved for summary judgment and was allowed leave to amend its motion for summary judgment. The court granted Defendant's motion for summary judgment. Plaintiff moved for reconsideration. The court denied Plaintiff's motion for reconsideration. Judgment dismissing the action was entered on December 15, 1995.

STATEMENT OF FACTS

Plaintiff was first employed by Defendant as a truck driver in 1990. CR 27, p. 56; CR 27 is reproduced at ER 11 to 176.

Plaintiff was born May 21, 1938. CR 27, p. 15. He has an associate degree from Cerritos Junior College in Norwalk, California. *Id.* at 16. He was a jet aircraft mechanic in the United States Air Force, where he was a crew chief to a basic air commander. *Id.* at 17-19. From 1969 to 1978 or 1979 he was an auto mechanic for Los Angeles County. *Id.* at 43-44. He also did some road test driving for the county. *Id.* at 45-46. He left the county to

drive trucks, first for Global Van Lines, then as an independent trucker. *Id.* at 45, 47, 48. He owned his own Kenworth truck. *Id.* at 48-49; Pl. Depo. 153-4. He moved to Oregon in 1980 or 1981 where he settled in Tillamook County and won the county garbage hauling contract. *Id.* at 50-52; Pl. Depo. 155-7. He kept that contract until 1988 or 1989, when he began driving trucks for Pastega Trucking. *Id.* at 53-55; Pl. Depo. 159-61. He continued driving for Pastega until he began work for Albertson's as a truck driver in 1990. *Id.* at 56; Pl. Depo. 165.

Plaintiff has a good driving record. CR 27, p. 57-58, 63-64; Pl. Depo. 234-235, 280-281. He has never been in an accident that was his fault. *Id.* He has no disqualifying moving citations on his driving record. *Id.*, at 130, 121; Ex. 3; Sturgill Depo. 38.

At the time Plaintiff was hired by Defendant, Ted Sturgill, transportation manager, gave him a 16-mile road test and certified, "It is my considered opinion that his [sic] driver possesses superior driving skill to operate safely the type of commercial motor vehicles listed above." CR 27, p. 133, 122-23; Ex. 20; Sturgill Depo. 47-48. The reference listed above was to a 1988 Kenworth, with a 1989 50' utility trailer. *Id.* at 133; Ex. 20. Mr. Sturgill found Mr. Kirkingburg to be a safe driver in that road test. *Id.* at 122-23; Sturgill Depo. 47-48. Plaintiff was given a physical examination and passed at the time of his hire in 1990. *Id.* at 117-18, 135; Sturgill Depo. 34-5; Ex. 22. He had a valid DOT card to drive a truck at that time. *Id.* at 119; Sturgill Depo. 36. Thereafter, Mr. Sturgill found Plaintiff to be a safe driver. *Id.* at 115; Sturgill Depo. 32. Likewise, his boss, Frank Riddle, General Manager, found Plaintiff to be a good,

safe driver. *Id.* at 78, 79, 85-86; Riddle Depo. 5, 6, 14-15. Plaintiff had a valid DOT card in 1991. *Id.* at 117, 136; Sturgill Depo. 34, Ex. 23.

Plaintiff has always had 20/200 corrected vision in his left eye. CR 27, p. 5; Pl. Aff. and Pl. Depo. 42-43. He is 20/20 corrected in his right eye. *Id.* at 9; Aff. of Beatrice Michel. The reduced acuity in his left eye is due to amblyopia, a condition marked by low or reduced visual acuity not correctable by refraction means and not attributable to an eye disease. *Id.* at 9, 137; Aff. of Beatrice Michel; Ex. 24. The condition is said to exist if the vision is 20/30 or worse with best correction. *Id.* With that condition he could easily perform the driving tasks required of him, in the opinion of his doctor. *Id.* The amblyopia in the left eye does not interfere with his ability to drive. *Id.* According to Plaintiff, the condition has never interfered with his work. *Id.* at 25; Pl. Depo. 46.

Plaintiff suffered a work-related injury in 1991 when he had a fall from a truck and hurt his head, shoulder and hand. CR 27, p. 23-34; Pl. Depo. 36-37. He was released unconditionally to return to work on November 3, 1992. *Id.* at 37, 59, 141-42; Pl. Depo. 91, 252; Ex. 29. Instead of returning Plaintiff to work, Defendant sent Plaintiff to its doctor for examination. *Id.* at 38; Pl. Depo. 92. Plaintiff saw a Dr. Douglas Eubanks, who gave him an unusually thorough examination. *Id.* at 39; Pl. Depo. 94. He was told he needed a "vision waiver." *Id.* at 40; Pl. Depo. 95. Dr. Eubanks found his vision to be 20/200 in his left eye as of November 6, 1992. *Id.* at 132; Ex. 17. The doctor noted that this was his corrected vision in that eye "since birth." *Id.*

Defendant's drivers are to be certified by the

Department of Transportation. CR 27, p. 82-84, 115; Riddle Depo. 11-13; Sturgill Depo. 32. Defendant has no physical requirements for vision other than what is contained in DOT regulations. Id. DOT regulations call for a minimum 20/40 vision corrected in each eye. Id. at 146; Ex. 34. There is nothing in writing at Albertson's which specifically adopts those physical requirements as Defendant's own. Id. at 109; Sturgill Depo. 24. Prior to November 6, 1992, the DOT instituted a vision waiver program whereby under certain limited circumstances it would issue waivers to allow drivers who could not meet the minimum vision qualifications of DOT to operate motor vehicles. Id. at 127, 159; Sturgill Depo. 57; Ex. 43. The purpose of the program was to accommodate individuals where it was reasonable to do so under the American With Disabilities Act, but not sacrifice highway safety. Federal Register, Vol. 57, No. 58 at 10295 (March 25, 1992).

On November 20, 1992, Ted Sturgill called Plaintiff and informed him that, "We're not going to accept the waiver." CR 27, p. 26-27, 138; Pl. Depo. 69-70; Ex. 25. It was Mr. Sturgill's understanding that Plaintiff was terminated for failure to pass a DOT physical. Id. at 104; Sturgill Depo. 9. This was not his decision. Id. He does not know who made the final decision, but believes it came from "Boise Legal." Id. That decision was communicated to him by Mr. Frank Riddle. Id. Mr. Riddle told him that Plaintiff had failed the visual part of the DOT physical and that the company would not accept a vision waiver. Id. at 105; Sturgill Depo. 10. Mr. Riddle told him Plaintiff was "legally blind or blind in one eye." Id. at 110; Sturgill Depo. 25. Mr. Sturgill testified there was no other reason for the termination. Id. at 106;

Sturgill Depo. 20. Mr. Sturgill testified that Mr. Riddle directed him to terminate Plaintiff. Id. at 107; Sturgill Depo. 22. Prior to that time, Mr. Sturgill had seen nothing in writing that the company would not accept vision waivers. Id. at 109; Sturgill Depo. 24. A termination form was completed for Plaintiff at that time. Id. at 72, 139; Norris Depo. 9; Ex. 26.

Mr. Sturgill recalls discussion about other positions for Plaintiff to perform. CR 27, p. 107; Sturgill Depo. 22. He does not recall if there was discussion about other work for Plaintiff before his termination. Id. at 108; Sturgill Depo. 23. Mr. Sturgill did not try to find Plaintiff work. Id. at 113; Sturgill Depo. 30. Mr. Riddle was aware that the employer had to reasonably accommodate disabled persons and testified he believed efforts were made by the company to find other jobs for Plaintiff. Id. at 80-82, 90; Riddle Depo. 9, 10, 11, 22. He expected his subordinate to look for other work for Plaintiff, specifically Charlie Norris was expected to do that. Id. at 92; Riddle Depo. 24. He testified that had Plaintiff not turned down a "yard hostler" and "tire man" positions, he would be employed there today. Id. at 101-102; Riddle Depo. 57-58.

Defendant did make some contacts with Plaintiff to offer him other positions. CR 27, p. 13-14; Depo. 4-5. Plaintiff was an injured worker who under Oregon Law had reinstatement rights. Id. at 20; Pl. Depo. 29 (ORS 659.415 and 659.420). Further, Defendant's own policy required reasonable accommodation. Id. at 74, 129; Norris Depo. 24; Ex. 1. In addition, as memorialized in the Scott Jardine, Corporate Director of Transportation, memorandum of June 4, 1993: "In situations where reasonable accommodation to a driver with a disability

are legally required, our priority is to accommodate the driver in ways other than a DOT minimum qualification waiver." Id. at 127, 159; Sturgill Depo. 57; Ex. 43.

Plaintiff remembers a call about a job moving trailers which he thought he had. CR 27, p. 13; Pl. Depo. 4. This was a "yard hostler" position. A yard hostler drives trailers within the confines of the facility, moves empty trailers into the dock, loads ones away from the dock, and stages them for dispatch. Id. at 93, 114; Riddle Depo. 27; Sturgill Depo. 31. Although DOT certification is required for that position, it does not have to be. Id. at 96; Riddle Depo. 40. The position is designed so it can be retained in the yard. Id. at 97; Riddle Depo. 41. The hostlers are not allowed on the road. Id. at 96; Riddle Depo. 40. To begin with, the equipment they operate is not road licensed. Id. If they are out on the road they are "in violation." Id. The job is required seven days a week, 24 hours a day, and is staffed with five or six positions, which positions can be temporary or permanent. Id. at 96, 98-99; Riddle Depo. 40, 42-43.

This was the first job Defendant spoke with Plaintiff about. CR 27, p. 29, 158; Pl. Depo. 77; Ex. 41. Plaintiff was asked by his union rep to call Frank Riddle, which he did. Id. at 29; Pl. Depo. 77. Mr. Riddle said he did not know about it and that he would have Frank Sturgill call back. Id. at 30; Pl. Depo. 78. Mr. Sturgill called back and said Plaintiff was supposed to go to the Portland distribution center, which he did. Id. After a one hour wait, Mr. Sturgill rudely asked Plaintiff if he had a DOT card, and Plaintiff replied he did and showed it to him. Id. at 31; Pl. Depo. 79. By this time, Plaintiff had obtained a DOT vision waiver and a valid DOT card. Id. at 32; Pl. Depo. 80. Mr. Sturgill gave Plaintiff papers to

read on how to hook up a trailer and asked him to wait in the lunch room. Id. Then, Dave Cooper, dispatch supervisor, told Plaintiff that Mr. Sturgill said to take the papers home and read the, stating "We'll be calling you." Id. at 32-33; Pl. Depo. 80-81. Plaintiff went home, but was never called. Id. at 33; Pl. Depo. 81. He was never given an explanation why he did not get that job. Id. at 14; Pl. Depo. 5. Mr. Riddle was told by Don King, an attorney with Albertson's, that Plaintiff had turned down the yard hostler position. Id. at 100; Riddle Depo. 55. Plaintiff never turned it down. Id. at 6; Pl. Aff.

Subsequently, Defendant informed the Bureau of Labor and Industries that it withdrew the offer because "we became concerned because the position does require DOT certification." CR 27, p. 163; Ex. 48. Mr. Riddle was unaware the offer had been withdrawn. Id. at 94; Riddle Depo. 29. Mr. Norris was unaware it had been made. Id. at 76; Norris Depo. 34.

Sometime later, the second job which was discussed with Plaintiff was a "tire man," but Plaintiff rejected that position because he had never changed a truck tire in his life, was told it would be \$8 - \$9 per hour, which was \$5 - \$6 less than what he had been earning, and would not get him back to driving trucks. CR 27, p. 34-46; Pl. Depo. 85-87. He also recalls that there was an experience requirement for that job that he did not satisfy. Id. at 41; Pl. Depo. 101.

Other jobs which became available, but which were not discussed with Plaintiff, included warehouse and dispatcher positions. CR 27, p. 66, 67, 90, 91; Cooper Depo. 5, 7; Riddle Depo. 22, 23.

Although Defendant claimed it would not allow its drivers to drive unless they met the minimum DOT vision

physical requirement of 20/40 corrected vision in each eye (CR 27, p. 160-62; Ex. 47), Plaintiff was allowed to drive for it when first hired in 1990 despite a corrected vision of 20/70 in his left eye, according to a company doctor, Robert Eubanks (CR 27, p. 135; Ex. 22), and was permitted to drive in 1991 despite a corrected vision of 20/100 in his left eye, according to a different company doctor, Theresa Eubanks. CR 27, p. 125, 136; Sturgill Depo. 52; Ex. 23. These reports were in Defendant's possession at the time, and raised no "red flags," so to speak. Id. at 60, 62, 110, 111, 112, 115-116, 119, 123, 124; Pl. Depo. 262-4; Sturgill Depo. 25, 26, 28, 32-33, 36, 48, 49. No effort was made to disqualify him. Id. at 116; Sturgill Depo. at 33. He was thought to be a safe driver. Id. at 115; Sturgill Depo. at 32.

Defendant's personnel manager was aware of its reasonable accommodation requirement, but knows of no undue hardship which would have been caused to it by accepting a vision waiver. CR 27, p. 69-71, 74; Norris Depo. 6, 7, 8, 24. Mr. Sturgill believed the undue hardship to be the "liability." Id. at 120; Sturgill Depo. 37. Yet, Mr. Riddle testified that when Plaintiff drove for Albertson's he was not a safety hazard. Id. at 86; Riddle Depo. 15.

Mr. Riddle testified that Defendant would accept changes in DOT minimum requirements, but if the DOT said to accommodate disabled persons it may waive certain of those requirements, this would not be acceptable. CR 27, p. 84; Riddle Depo. 13.

Mr. Riddle said that according to the reports he saw, Plaintiff's vision was deteriorating. CR 27, p. 86; Riddle Depo. 15. He testified that before making the decision to terminate, he instructed Charlie Norris, personnel

manager, to review Plaintiff's vision file with Plaintiff. Id. at 87-89; Riddle Depo. 16-18. This never happened. Id. at 5-6, 72-78; Pl. Aff; Norris Depo. 9-10. It was not true that Plaintiff's vision had been deteriorating. Id. at 5-9, 137; Pl. Aff; Aff. of Beatrice Michel; Ex. 24. Plaintiff's vision in his left eye tested out by his own doctor at 20/200 in 1988 and on October 19, 1992. Id. at 131, 134; Ex. 16; Ex. 21. There was no discussion about sending Plaintiff for another exam or getting his history from his doctor. Id. at 128; Sturgill Depo. 58.

After Plaintiff's termination, he received a vision waiver from the Department of Transportation. CR 27, p. 28; Pl. Depo. 75. This was obtained on February 25, 1993. Id. at 28, 149-150; Pl. Depo. 75; Ex. 36; Ex. 37. He had requested Defendant's help in obtaining the waiver in December 1992 because the DOT required that the employer provide certain of the information necessary to obtain the waiver. Id. at 143-45; Ex. 32. He had first applied for the waiver on November 12, prior to the November 20 call terminating his employment. Id. Defendant's personnel manager was instructed by Mr. Riddle not to respond to the request. Id. at 75, 99; Norris Depo. 32; Riddle Depo. 43. Mr. Riddle told him he would take that up with the corporate people. Id. at 99; Riddle Depo. 43. Plaintiff advised Defendant he obtained the vision waiver on March 1, 1993. Id. at 152-157; Ex. 39; Ex. 40. Mr. Sturgill became aware he had received it. Id. at 126; Sturgill Depo. 56.

Plaintiff had also requested to be reinstated on December 18, 1992. CR 27, p. 141-42; Ex. 29. That request was denied. Id. at 146; Ex. 34.

Plaintiff was identified by Defendant as the "driver with the vision problem in Portland" by Scott Jardine on

January 29, 1993. CR 27, p. 148-149; Ex. 35.

ARGUMENT

I. The Lower Court Erred In Granting Defendant's Motion For Summary Judgment Because Plaintiff Raised A Genuine Issue Of Fact As To Whether Plaintiff Was A Qualified Individual Under The Americans With Disabilities Act.

A. Plaintiff Adduced Evidence Which Raises A Question Of Fact As To Whether He Could Perform The Essential Functions Of His Job With Or Without Accommodation.

Plaintiff brought disability/perceived disability discrimination claims based upon his visual impairment under the American With Disabilities Act (hereafter "the ADA"), 42 U.S.C. §12101, *et. seq.*, which prohibits covered employers from discriminating in the terms, conditions and privileges of employment against a qualified individual with a disability. 42 U.S.C. §12112(a).

To make a *prima facie* case under the ADA, the plaintiff must show that (1) he is a disabled individual; (2) he is qualified, that is, he can perform the essential functions of the job with or without reasonable accommodation; and (3) the defendant terminated him or subjected him to some other adverse employment action because of his disability. *Schmidt v. Safeway, Inc.*, 864 F.Supp. 991, 996 (D. Or. 1994).

Under the ADA, an individual is protected if he or she is:

(1) a person with a physical or mental impairment that substantially limits one or more major life activities;

(2) a person with a record of such physical or mental impairment; or

(3) a person who is regarded as having such an impairment.

42 U.S.C. §12102(2). The ADA defines a physical impairment as:

"[a]ny physical disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs"

29 C.F.R. §1630.2(h).

A "major life activity" is defined to include seeing or working. 29 C.F.R. App. §1630.2(I).

It has been held under the Rehabilitation Act of 1973 that someone who is legally blind is a handicapped individual.¹ *Norcross v. Sneed*, 573 F.Supp 533, 536 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir.); *see Gurmankin v. Costanzo*, 411 F.Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3rd Cir. 1977) (a blind person "is certainly" a handicapped person under the

¹The ADA is patterned after the Rehabilitation Act of 1973, Pub.L. No. 93-112, 87 Stat. 355, codified as amended at 29 U.S.C. §2 701-796i, and it is appropriate when examining it to examine the scope of the federal law on which it is based. 29 C.F.R. §1630.1(c).

Rehabilitation Act). It has also been held that someone with extremely poor sight is handicapped under the Rehabilitation Act. *Sharon v. Larson*, 650 F.Supp 1396, 1401 (E.D. Pa. 1986) (it is not disputed that an individual who had visual acuity with the right eye of 20/200 and visual acuity with the left eye of 20/300 using corrective lenses is handicapped under the Act); *see generally* Francis M. Dougherty, Who is "Individual With Handicaps" Under The Rehabilitation Act of 1973 (29 U.S.C.S §§701 et. seq.), 97 ALR Fed 40, §4[b] and 4[c], pp. 58-60.

Defendant, below, did not challenge that Plaintiff's vision impairment qualifies as a physical impairment under the ADA; rather, Defendant argued Plaintiff is not an otherwise qualified individual.

1. Plaintiff Is A Qualified Individual With A Disability.

The ADA prohibits discrimination against any "qualified individual" with a disability. 42 U.S.C. §12112. Under the ADA, a "qualified individual with a disability" is one who "with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). The analysis under the ADA is two-step: First, whether the individual satisfies the prerequisites for the position; and, second, whether or not the individual can perform the essential functions of the position held with or without reasonable accommodation. 29 C.F.R. §1630.2(m). Whether a particular function is essential is a factual determination that must be made on a case-by-case basis, considering all relevant evidence. 29 C.F.R. App. §1630.2(n). To be an essential function the function must bear more than a

marginal relationship to the job at issue. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1386 (1994).

Defendant argued below that Plaintiff was not otherwise qualified because Plaintiff did not meet the DOT minimum requirements for interstate truck driving, which Defendant considers to be an essential requirement of the job. CR 24; Def's Memo in Supp of Mo for Sum. J at 6. The premise of Defendant's argument was that Plaintiff needed to meet the DOT physical requirements for interstate truck driving and that therefore those physical requirements themselves equate to an essential prerequisite of the job. However, it is not the physical vision requirements set by DOT that are a prerequisite for the position; it is, according to Defendant's management, the DOT certification. *See* CR 27, p. 82-84, 109, 115, 127, 159; Riddle Depo. 11-13; Sturgill Depo. 24, 32, 57; Ex. 43. Mr. Riddle testified that Defendant would accept changes in the DOT minimum requirements. CR 27, p. 84.

Defendant has no physical prerequisites for vision other than what is contained in the DOT regulations. CR 27, p. 82-84, 115; Riddle Depo. 11-13; Sturgill Depo. 32. Plaintiff's argument that the DOT vision requirements themselves are not truly a legitimate prerequisite is strengthened by the fact that although Defendant claimed it would not allow drivers to drive unless they met the minimum DOT vision requirement in each eye,² Defendant did not previously apply that alleged

²DOT requirements are corrected vision of at least 20/40 in each eye. Ex. 47.

prerequisite to Plaintiff. Indeed, Plaintiff was hired to drive in 1990 despite a recorded corrected vision of 20/70 and permitted to drive in 1991 despite a recorded corrected vision of 20/100. DR 27; p. 136; Sturgill Depo. 52; Ex. 23; Ex. 47; Supplemental Materials, CR 44, at ER 182. These reports of supposedly deficient vision did not raise any concerns ("red flags") to Defendant's management at the time and no attempt was made to disqualify Plaintiff. CR 27, pp. 60-62, 110, 111-112, 115-16, 119, 123-124; Sturgill Depo. 25, 26, 28, 32-33, 36, 48, 49; Pl. Depo. 262-4. Viewed in the light most favorable to Plaintiff, the evidence is that Defendant considered a prerequisite for the job to be that Plaintiff had a DOT card, that is DOT certification; not that Plaintiff's vision met minimum requirements, specified or otherwise. Thus, evidence exists that raises a question of fact as to the first step in the essential functions analysis: Whether Plaintiff satisfied the legitimate prerequisites of the job of truck driving.

The second step of the analysis is whether Plaintiff could perform the essential functions of the position of truck driver with or without reasonable accommodation. 29 C.F.R. §1630.2(m). Significantly the employer's duty of reasonable accommodation applies to both the essential functions of the job and may also apply to the prerequisites of the position in question. EEOC Technical Assistance Manual, 2 Accommodating Disabilities (CCH) ¶100.140 (1993), CR 45, pp. A 1-2, at ER 190 to 191. As stated in the EEOC Technical Assistance Manual,

"the ADA requires that even if a qualification standard or selection criterion is job related and consistent with business necessity, it may not be

used to exclude an individual with a disability if this individual could satisfy the legitimate standard or selection criterion with a reasonable accommodation." *Id.*; at ER 191.

The EEOC uses an example of a forklift operator, where the job has a physical requirement of an ability to lift a 70-lb. weight, where the essential function of the job is the mechanical operation of the forklift. CR 45, p. 3, at ER 192. The EEOC states that even where the physical requirement is legitimately job related, the requirement could be eliminated as a reasonable accommodation, where other employees could assist a disabled forklift driver. Likewise, here even if the vision requirements are a legitimate selection requirement, which as Plaintiff argues above they are not, they can be eliminated or altered as part of a reasonable accommodation, where Plaintiff could still perform the essential function of driving a truck. Here, that reasonable alteration would be the acceptance of a DOT vision waiver.

Here, Plaintiff adduced evidence that raises a question of fact as to whether Plaintiff could perform the essential function of truck driving. Plaintiff had performed the duties of the position without being at fault in an accident since his hire and for years before his employment with Defendant. See factual discussion, *supra*, at 3-4; CR 27, p. 57-58, 63-64; Pl. Depo. 234-235, 280-281. His supervisors tested him and believed he was a safe driver. CR 27, p. 78, 79, 85-86, 115, 122-123, 133; Sturgill Depo. 32, 47-48; Riddle Depo. 5, 6, 14-15; Ex. 20. His amblyopia in the left eye did not interfere with his ability to drive, never interfered with his work, and in the opinion of his doctor even with the condition he could

still easily perform the driving tasks required of him. CR 27, p. 9, 25; Pl. Depo. 46; Aff. of Beatrice Michel; Ex. 24. As Plaintiff's eye doctor explained in deposition testimony, there are many "monocular cues" to depth perception that people with Plaintiff's condition develop, and in her opinion she believed Plaintiff was competent to drive "from a visual standpoint." CR 45, Attachment B, pp. 4-9 at ER 201 to 206. Indeed, Plaintiff's eye doctor was instrumental in helping Plaintiff obtain a DOT vision waiver based upon her personal assessment of Plaintiff's condition. See CR 45, Attachment B; at ER 199f; CR 27, pp. 7-9, at ER 20 to 22. In sum, there is evidence which raised a question of fact as to whether Plaintiff could perform the essential function of truck driving.

II. The Lower Court Erred In Holding That No Reasonable Accommodation Was Possible And Specifically That Defendant Was Not Obligated To Accept DOT Vision Waivers.

A. A Question Of Fact Exists As To Whether The DOT Vision Waiver Was A Possible Reasonable Accommodation.

The lower court held that "No reasonable accommodation was possible. 'An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job.'" CR 48, Opinion at 7, at ER 218. The lower court stated: "The ADA does not obligate defendant to employ truck drivers who have received vision waivers. The vision waiver program is a

flawed experiment that has not altered the DOT vision requirements." *Id.*

The term "reasonable accommodation" is an open-ended one. *Schmidt v. Safeway, Inc., supra*, 864 F.Supp. at 996. The statutes and regulations offer examples, but caution that the term is not limited to those examples. *Id.*, citing 42 U.S.C. §12111(9); 29 C.F.R. §1630.2(o); 29 C.F.R. Pt. 1630, App. "An employer may, in appropriate circumstances, have to consider the provision of leave to an employee as a reasonable accommodation, unless the provision of leave would impose an undue hardship." *Schmidt v. Safeway, Inc., supra*, 864 F.Supp. at 996 (citations omitted). Here, one possible reasonable accommodation not given was leave to obtain a vision waiver.

Ordinarily, the reasonableness of an accommodation is an issue for the jury. *Schmidt, supra*, 864 F.Supp. at 997; *Hindman v. GTE Data Services*, 3 AD Cases 641, 644 (M.D. Fla. 1994) (question of whether a leave of absence was a reasonable accommodation in order for an employee with a chemical imbalance to receive treatment where there was evidence the individual was able to recover was a question of fact for the jury precluding summary judgment). Here, evidence was adduced which raised a question of fact as to whether the acceptance of a DOT vision waiver would have been a possible reasonable accommodation. As explained below, if Defendant had conducted an individualized assessment of Plaintiff's vision it would have concluded that Defendant's physical impairment affecting his vision did not create an undue safety risk. Historically, Plaintiff had worked for years as a truck driver without incident. Medically, Plaintiff's condition would "not interfere with

his ability to drive." Aff. of Beatrice Michel; CR 27, p. 9, at ER 22. Subjectively, Plaintiff's supervisors believed he was a safe driver based upon direct observation and his performance for Defendant. Given this evidence, and viewing it in the light most favorable to Plaintiff, it cannot be said as a matter of law that "[n]o reasonable accommodation was possible."

**B. No Reasonable Accommodation Was Attempted
In Lieu Of Accepting The DOT Vision Waiver.**

Even if the lower court was correct in holding that Defendant was not required to accept the DOT vision waiver, that does not excuse Defendant of its duty to accommodate Plaintiff's disability.

The ADA imposes upon an employer an affirmative duty to make a reasonable accommodation for its employees' physical impairments. *See* 29 C.F.R. §1630, App. §1630.2(o); *Braun v. American International Health*, 315 Or 460, 470, 846 P.2d 1151 (1993) (interpreting Oregon disability discrimination law, which is also patterned on the Rehabilitation Act, and citing 41 C.F.R. §60-741.6(d) (1992)). Likewise, reassignment is a potentially reasonable accommodation, although in general it "should only be considered when accommodation within the individual's current position would pose an undue hardship." 29 C.F.R. §1630, App., §1630.2(o). Thus, Defendant had an affirmative duty to look for a means to accommodate Plaintiff in his truck driver position and if that proved to be an undue hardship, to consider reassignment.

Below, Defendant cited to its offer of a job as "yard hostler" and later as a "tire man" as attempted reasonable

accommodations. Indeed, Mr. Riddle testified that had Plaintiff not turned down the yard hostler and tire man positions, he would be employed there today. CR 27, p. 101-102; Riddle Depo. 57-58, at ER 112-113.

The problem with Defendant's argument is that Plaintiff never turned down the yard hostler position. CR 27, p. 6; Pl. Aff. Indeed, he thought he had the position. Furthermore, a question of fact was raised as to whether Defendant's asserted explanation for "withdrawing" the offer was pretextual.

Defendant claimed it withdrew the yard hostler offer after Plaintiff did not accept it, implying Plaintiff delayed or was partly responsible for not getting the position. However, evidence exists that Plaintiff did all that was asked of him to assist in getting the position. He called Mr. Riddle, he talked to Mr. Sturgill, he went to the Portland distribution center, he waited there and presented his DOT card when asked for it, and he took the papers given to him home and waited for Defendant's call. CR 27, p. 29-33; Pl. Depo. 77-81; Ex. 41. Although Plaintiff went home, he was never called and never given an explanation as to why he did not get the job. CR 27, pp. 14-33; Pl. Depo. 5, 81.

Defendant argued below that it withdrew the yard hostler position because it became concerned about safety issues since the position required DOT certification. However, evidence was adduced that the nature of the job would not require DOT certification; and, in fact, Plaintiff had the required DOT certification. While discussing the position with Mr. Sturgill, when rudely asked if he had a DOT card, Plaintiff presented it since by that time he had obtained a DOT vision waiver and a valid DOT card. CR 27, p. 30-32; Pl. Depo. 78-80. Furthermore, Mr. Riddle

testified that DOT certification did not have to be required for the yard hostler position. CR 27, p. 97; Riddle Depo. 41.

The yard hostler drives trailers within the confines of the facility and hostlers are not allowed on the road, for the equipment they drive are not road licensed. CR 27, p. 94, 97, 100; Riddle Depo. 27, 41; Sturgill Depo. 31. Indeed, although DOT certification is required by Defendant, it does not have to be for the position is designed so it can be performed within the confines of the yard. Id. at 96-97; Riddle Depo. 40-41. Thus, a question of fact exists as to whether DOT certification was a legitimate requirement and as to whether safety was the motivating concern.

Additional evidence of pretext was adduced that Mr. Riddle was unaware the offer had been withdrawn and had been told Plaintiff rejected it. CR 27, p. 94-100; Riddle Depo. 29, 55.

Regarding the second job discussed with Plaintiff, "tire man," Plaintiff rightfully rejected that offer because he had no experience doing that job, it paid substantially less per hour (\$8 - \$9, which is \$5 - \$6 less than what he had been earning) and he did not satisfy an experience requirement. For a reassignment to be a reasonable accommodation, it needs to be "to an equivalent position in terms of pay, status, etc." 29 C.F.R. §1630(2)(o).

As to other job "offers," there is a question of fact as to whether Defendant considered Plaintiff for either a warehouse position or a dispatcher position. Defendant argued it encouraged Plaintiff to apply for a warehouse position, but he failed to pass a qualifying test. However, there was also evidence that other jobs that became available, including warehouse and dispatcher positions,

were not discussed with Plaintiff. CR 27, p. 90-91; Riddle Depo. 22, 23; Cooper Depo. 5, 7.

III. The Lower Court Erred In Holding That Defendant Need Not Make An Individual Assessment Of Plaintiff's Ability To Drive Safely With His Vision Condition.

Defendant relied upon *Chandler v. City of Dallas*, *supra*, to argue that as a matter of law a truck driver with impaired vision who does not meet the DOT requirements in 49 C.F.R. §391.41 cannot be reasonably accommodated because of the inherent safety risk. The lower court erred when it adopted Defendant's argument that no reasonable accommodation existed.

In a post-*Chandler* case, *Sarsycki v. United Parcel Service*, 862 F.Supp. 336 (W.D. Okl. 1994), the court notes that "the *Chandler* holding has been undermined by the fact that the FHWA [Federal Highway Administration] has recently instituted a waiver program for . . . drivers of commercial motor vehicles which the FHWA believes is 'consistent with the safe operation' of those vehicles." 862 F.Supp. at 341 (discussing insulin-dependent drivers). As the court notes in *Sarsycki*, "[t]his change in policy was partly a result of an ADA mandate requiring the FHWA to conduct a review of its regulations 'in order to ascertain whether the standards conform with the current knowledge about the capabilities of persons with disabilities.'" Id., citing 58 Fed. Reg. 40,693 (1993). Although the court in *Sarsycki* was discussing insulin-dependent drivers, the analysis is equally applicable to the present case and the criticism of *Chandler* equally apt.

The problem with Defendant's safety risk defense, and the lower court's adoption of it is that an "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices." *Bombrys v. City of Toledo*, 849 F.Supp. 1210, 1219 (N.D. Ohio 1993) (blanket disqualification of individuals with insulin-dependent diabetes as candidates for police officer violates ADA); accord *Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342, 345 (D. Ariz. 1992) (enjoining the defendant from implementing a policy banning coaches in wheelchairs from the coaches' boxes along the baselines, where an individualized assessment revealed that the plaintiff had successfully served as either a first base or second base coach for three years without incident.)

As the EEOC states in its Technical Assistance Manual:

The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. An employer is not required to hire or retain an individual who would pose a "direct threat" to health or safety (see below). But the ADA requires an objective *assessment of a particular individual's current ability* to perform a job safely and effectively. Generalized "blanket" exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date medical knowledge and technology, or that are based on fears about future medical or workers' compensation costs, are unlikely to survive a legal challenge under the ADA.

* * *

The ADA requires that:

any determination of a direct threat to health or safety must be based on an *individualized* assessment of objective and specific evidence about a particular *individual's* present ability to perform essential job functions, not on general assumptions or speculations about a disability. (See *Standards Necessary for Health and Safety: A 'Direct Threat'* below.)

EEOC Technical Assistance Manual, 2 Accommodating Disabilities (CCH) at ¶100.140,

CR 45, Attachment A, p. 3 - 4, at ER 192 to 193. (Emphasis in original).

Thus, even when faced with a perceived safety risk, according to the EEOC an individualized assessment of the impact of each person's disability is necessary. Indeed, the requirement for individualized assessments was one of the reasons for the DOT's waiver program. Federal Register, Vol. 57, No. 58 at 10295. The individualized assessment required under the ADA includes an examination of the individual's history and habits as well as physical attributes that may compensate for or mitigate the effect of the impairment in question. *Fiedler v. American Multi-Cinema, Inc.*, 871 F.Supp. 35, 39-40 (D.D.C. 1994).

Here, if such an individualized assessment of Plaintiff had occurred, a question of fact exists as to whether Defendant would have allowed Plaintiff to continue to

drive, for Mr. Riddle believed that when Plaintiff drove for Defendant he was not a safety hazard. Indeed, Plaintiff has had his same visual impairment since birth and has driven trucks for Defendant and others for years without incident. CR 27, 45-56, 121, 130; Pl. Depo. 150-157, 159-61, 165, 234-235; Ex. 3; Sturgill Depo. 38. Further, Plaintiff's doctor determined his condition would not interfere with his ability to drive. CR 27, p. 9, at ER 22.

Here, Plaintiff adduced evidence that Defendant applied a blanket disqualification of Plaintiff. Mr. Riddle testified that Defendant would accept changes in DOT minimum requirements. However, he also testified that if the DOT said that to accommodate disabled persons Defendant may waive certain of those minimum requirements, it would be unacceptable. CR 27, p. 84; Riddle Depo. at 13. Furthermore, there was no discussion about sending Plaintiff for another exam or getting his history from his doctor. *Id.* at 128 Sturgill Depo. 58. Having failed to conduct an individualized assessment of the relative safety risks, Defendant was not entitled to judgment as a matter of law on the issue of whether Plaintiff was an otherwise qualified individual with a disability.

It is important to note that Plaintiff is not arguing that all DOT vision waivers had to be accepted by any employer in all cases. Thus, whether or not the DOT vision waiver program was a "flawed experiment," as the lower court held, is really not in issue. Plaintiff's position is that a reasonable accommodation in Plaintiff's particular case, given his vision condition, would have been to accept the DOT vision waiver, since he could safely drive a truck and had proven over a number of

years that he could; and, that under the ADA the determination of whether Plaintiff could safely drive a truck required an individualized assessment of his condition and abilities in order to avoid unlawful discrimination on account of that condition. Since there is evidence that Defendant failed to conduct that individualized assessment, a question of fact exists as to whether Defendant failed to reasonably accommodate Plaintiff's vision impairment.

IV. The Lower Court Erred In Holding That Defendant Was Not Required To Make A Reasonable Accommodation By Transferring Plaintiff To A Truck Hostler Position Or Some Other Position In Lieu Of Termination When Plaintiff Already Had A State Statutory Right To Reinstatement As An Injured Worker. The Issue Thus Became Whether Reasonable Accommodation Could Have Facilitated Plaintiff's Return.

In the present case, there was additional reason why Defendant had an affirmative duty to offer a suitable reassignment and make reasonable accommodation in that new position. Here, Plaintiff was an injured worker. As an injured worker, once Plaintiff was released to work he was entitled to his old job or a suitable alternative if his old job was not available. ORS 659.415; ORS 659.420. It is in that context that we must examine whether Defendant reasonably accommodated Plaintiff to facilitate that return.

Plaintiff was released unconditionally to work on November 3, 1992. CR 27, p. 37, 59, 141-142; Pl. Depo.

91, 252; Ex. 29. However, instead of returning Plaintiff to work, Defendant sent him to its doctor for an examination, which revealed he had 20/200 vision in his left eye and needed a DOT vision waiver. CR 27, pp. 38-40, 132; Pl. Depo. 92, 94, 95; Ex. 17. As a result of that examination, Defendant's own doctor, Dr. Douglas Eubanks, stated that Plaintiff needed a "vision waiver," not that he should not drive. CR 27, p. 40; Pl. Depo. 95. Thus, at the time Defendant learned of Plaintiff's physical disability that required reasonable accommodation it also had a legal obligation to return him to his former position or a suitable alternative. Since Defendant was subject to both legal obligations at the same time it had a legal obligation to make reasonable accommodation so Plaintiff could return to his job as a truck driver or to offer him reasonable accommodation in a suitable alternative position as a disabled injured worker.

In denying Plaintiff's motion for reconsideration, the lower court assumed for purposes of the motion that reassigning Plaintiff to a vacant position was a possible reasonable accommodation. However, the court held that Plaintiff had not shown the yard hostler position was vacant at the time of termination and even if it was, driving was still an essential function of the job. Order, p. 2; CR 53 at ER 224. Contrary to the lower court's holding, evidence was adduced that the "yard hostler" position was vacant. *See* factual discussion, *supra*, at 8-9. Indeed, Mr. Riddle testified that had Plaintiff not turned down a "yard hostler" position he would still be employed by Defendant. Riddle Depo. 57-58, CR 27 at ER 101-102. Furthermore, Plaintiff denied ever turning down the position. For purposes of summary judgment, that dispute is sufficient to raise a question of fact as to

whether or not the position was vacant.

Defendant's personnel manager did not know of any undue hardship to Defendant that would have existed by accepting a vision waiver. CR 27, pp. 69-71, 74; Norris Depo. 6, 7, 8, 24. Mr. Sturgill believed the undue hardship to be the "liability" presumably attendant thereto. In the absence of any undue hardship and of an individualized assessment of the safety risks, Defendant could not avoid its reasonable accommodation requirement by simply refusing to accept the DOT vision waiver on such generalized and stereotypical grounds.

Furthermore, evidence was adduced that raises a question of fact as to whether DOT certification was required for the yard hostler position since the position was designed so it could be performed within the confines of the yard. Riddle Depo. 41; CR 27, pp. 96, at ER 107. Testimony by Defendant's management raises a question of material fact as to whether the proposed accommodation of the yard hostler position would have been futile.

Therefore, the court erred in holding there was no requirement that Defendant reasonably accommodate Plaintiff in the yard hostler position, or in some other suitable alternative position.

CONCLUSION

The district court erred in granting Defendant's motion for summary judgment on Plaintiff's ADA claim. This Court should reverse the district court and remand this case for further proceedings.

DATED this 27 day of August, 1996.

Respectfully submitted,

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050

s/ Scott N. Hunt
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Of Attorneys for Plaintiff-Appellant

(Statement of Related Cases and Certificate of Service
omitted in printing)

(Caption omitted in printing)

ANSWERING/OPENING BRIEF OF
DEFENDANT/APPELLEE

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF JURISDICTION

1. Basis For District Court Subject Matter Jurisdiction

The United States District Court for the District of Oregon
had federal question jurisdiction over Plaintiff's disability
claim brought under the Americans with Disabilities Act, 42
USC §12101, et. seq. (hereafter "ADA"), pursuant to 28 USC
§1331 and 28 USC §1343(a)(4).

2. Basis for Ninth Circuit Court of Appeals Jurisdiction

Pursuant to 28 USC §1291, this Court has jurisdiction over
the final decision of the United States District Court for the
District of Oregon.

3. Date of Entry of Judgment and Order

Plaintiff is appealing from the Opinion and Order entered
in this action on October 25, 1995, and from the Order
denying reconsideration entered November 9, 1995, and from
the Judgment of Dismissal entered on December 15, 1995.
Appellant's Excerpts of Record (hereafter "E.R.") 211-20;
223-5; 226. Appellee Albertsons accepts the remainder of
Appellant's statements regarding procedural history.

ATTORNEYS' FEES

Pursuant to 42 USC §12205, Appellee Albertsons
respectfully requests this Court grant it reasonable attorney's
fees, litigation expenses, and costs if the Court affirms the
lower court's decision.

STANDARD OF REVIEW

The Court's review of an Order granting Summary

Judgment is *de novo*. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995) (citing Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994)). The Court must first determine whether the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issues of material fact and whether the district court correctly applied the law. *Id.* Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex v. Catrett, 477 U.S. 317, 322, 91 L. Ed.2d 265, 106 S. Ct. 2548 (1986). The moving party is entitled to a judgment as a matter of law when there is no genuine issue as to any material fact. *Id.* (citing Federal Rules of Civil Procedure 56(c)).

STATEMENT OF THE CASE

Albertsons hired Plaintiff as a truck driver at the Portland, Oregon Distribution Center on August 21, 1990. Kirkingburg Dep. Exhibit 6, Appellee's Supplement Excerpt of Record (hereafter "Supp. E.R.") 29. On December 3, 1991, Plaintiff fell from a truck while on the job and injured his head, hand, and shoulder. Kirkingburg Dep., p. 37, 91, E.R. 37, 50. Plaintiff was off work due to the injury until he was released to return to work in November of 1992. Kirkingburg Dep., p. 91, E.R. 50.

All over the road truck drivers are required by the federal government to be certified as medically competent to drive. 49 CFR §391.41(a). While Plaintiff was an employee of Albertsons, he was certified twice by two different medical examiners. In regard to vision standards, Department of Transportation (hereafter "DOT") regulations require a minimum acuity score of 20/40 corrected in each eye. Sturgill Dep. Exhibit 34, E.R. 157.

Although Plaintiff's medical examination on August 18, 1990 revealed Plaintiff had acuity ratings of 20/25 vision in

the right eye and 20/70 (a failing grade) in the left eye, the medical examiner certified that Plaintiff met the requirements under the Motor Carrier Safety Regulations, 49 CFR §391.41-391.49. Sturgill Dep. Exhibit 22, E.R. 146. Plaintiff's medical examination form of February 5, 1991, showed Plaintiff had acuity ratings of 20/25 vision in the right eye and 20/100 (a failing grade) in the left eye, yet once again a medical examiner certified that Plaintiff met the requirements under the Motor Carrier Safety Regulations. Sturgill Dep. Exhibit 23, E.R. 147.

Plaintiff testified that he was born with vision in his left eye of 20/200 and that it has not changed. Kirkingburg Dep., pp. 43, 95, 103-4, 275, 287; Supp. E.R. 2, 8-10, 19, 20. Albertsons historically has deferred to the medical certifications of its examining physicians, as evidenced by their completion of the DOT certification cards. Jardine Affidavit ¶4, Supp. E.R. 68-69; Sturgill Dep. pp. 24, 34, Supp. E.R. 46, 47.

Albertsons' company policy requires that all drivers are recertified (DOT certification) when they return from a long term injury. Sturgill Dep. pp. 49, 52-3, Supp. E.R. 48-50; Riddle Dep. p. 30, Supp. E.R. 55. Thus, when Plaintiff returned from his nearly one year medical absence, Albertsons asked him to recertify with a physical examination from the Eubanks clinic on November 6, 1992. Sturgill Dep. p. 49, Supp. E.R. 48; Riddle Dep. p. 30, Supp. E.R. 55. Dr. Douglas Eubanks, D.O., examined Plaintiff and correctly found his acuity rating to be 20/20 in the right eye and 20/200 (a failing grade) in the left eye. E.R. 143. Dr. Eubanks found that Plaintiff failed to meet the minimum vision requirements under DOT standards and so advised Albertsons' Transportation Department on November 6, 1992. E.R. 143; Sturgill Dep. Exhibit 34, E.R. 157.

At all times, Plaintiff, insisted on returning to work as a driver. Norris Dep. pp. 17-18, Supp. E.R. 41-42. Albertsons' consistent policy has been only to employ drivers who meet or

exceed the minimum DOT standards. King Affidavit ¶4, Supp. E.R. 66-67; Jardine Affidavit ¶5, Supp. E.R. 69; Riddle Dep. pp. 11-13, 60, Supp. E.R. 52-54, 62. Albertsons has never accepted DOT waivers. King Affidavit ¶3, Supp. E.R. 66; Jardine Affidavit ¶3, Supp. E.R. 68.

While Albertsons did not believe Plaintiff was otherwise qualified to drive a commercial vehicle, it did consider plaintiff for and offered to Plaintiff other jobs. King Affidavit ¶5, Supp. E.R. 67. After terminating Plaintiff's employment, Albertsons offered Plaintiff the positions of Yard Hostler (moving trailers at the Distribution Center) (Kirkingburg Dep. p. 77; Supp. E.R. 3) and Tire Man. Kirkingburg Dep. pp. 84-85; Supp. E.R. 4-5. When Albertsons realized that the Yard Hostler position also required DOT certification, the Company withdrew the offer before it was accepted. Riddle Dep. p. 55, Supp. E.R. 60. Plaintiff refused the Tire Man position. Kirkingburg Dep. 85-87, Supp. E.R. 5-7, Norris Dep. p. 18, Supp. E.R. 42. General Manager of the Distribution Center Frank Riddle and Corporate Labor Relations personnel decided to terminate Plaintiff from his job as a commercial truck driver. Riddle Dep. pp. 11-12, Supp. E.R. 52-53. Mr. Riddle reviewed Plaintiff's DOT file before terminating him. *Id.* Plaintiff's DOT file showed he did not meet the DOT minimum requirements of the DOT manual. *Id.* Additionally, Albertsons' Driver Manual states, "As an Albertson's driver, you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." Riddle Dep. Exhibit 2, Supp. E.R. 63-65. Under these standards, Plaintiff should never have been allowed to drive for Albertsons at all. See 49 CFR §391.41(a), (b)(10).

Albertsons issued a policy statement on June 4, 1993, reinforcing its policy for driver compliance with all DOT and company safety rules, "Albertson's owes it to its customers, employees and the public to have the safest possible driver workforce . . . We should continue to apply the minimum

standards of the DOT to applicants and employees. In situations where reasonable accommodations to a driver with a disability are legally required, our priority is to accommodate the driver in ways other than a DOT minimum qualification waiver." Sturgill Dep. Exhibit 43, E.R. 170. Albertsons has never accepted waivers from DOT minimum requirements because of concern for the safe operation of its vehicles. Riddle Dep. pp. 13, 60, Supp. E.R. 54, 62; Jardine Affidavit ¶3, Supp. E.R. 68.

Frank Riddle directed Theodore Sturgill, the Transportation Manager, to terminate Plaintiff's employment because he did not meet the minimum DOT requirements. Sturgill Dep. pp. 22-24, Supp. E.R. 44-46. Transportation Manager Ted Sturgill, and Personnel Manager Charles Norris terminated Plaintiff's employment with the Company on November 20, 1992 for failing the DOT physical. Kirkingburg Dep. Exhibit 9, pp. 1-2, Supp. E.R. 30-31. Plaintiff obtained a vision waiver from DOT¹ on February 2, 1993. Sturgill Dep. Exhibit 36, E.R. 160. Employers have never been required to accept vision waivers.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly granted Summary Judgment finding there were no genuine issues of material fact; Plaintiff was not a qualified individual with a disability under the Americans with Disabilities Act because he could not perform the essential functions of driving a commercial

¹The experimental vision-waiver program was invalidated August 2, 1994. Advocates for Highway Safety v. Federal Highway Administration, 28 F.3d 1288, 1294 (D.C. Cir. 1994). The court found the Federal Highway Administration (FHWA) adopted the waiver program contrary to law. *Id.* The FHWA failed to determine that a waiver was consistent with the safe operation of commercial motor vehicles. *Id.* See discussion *infra*, p. 25-26.

vehicle.

2. Whether the District Court properly held that no reasonable accommodation was possible and specifically that Defendant was not logically obligated to accept Department of Transportation vision waivers of minimum acuity ratings.

3. Whether the District Court properly held that Defendant could rely on Department of Transportation vision standards and need not make an individual assessment of Plaintiff's ability to drive a commercial vehicle.

4. Whether the District Court properly held that Defendant was not required to make a reasonable accommodation by transferring Plaintiff to a Yard Hostler position or some other available and suitable position.

SUMMARY OF THE ARGUMENT

Plaintiff was not an "otherwise qualified" individual with a disability under the ADA because he could not perform the essential functions of driving a commercial truck. The ADA's affirmative duties on an employer to "reasonably accommodate" are only required when an individual meets the threshold test of being a qualified individual with a disability. Plaintiff did not meet the minimum vision requirements for DOT certification to drive a commercial vehicle. DOT certification and the DOT vision requirements are linked together. Without meeting the minimum DOT requirements, Plaintiff was not DOT certified, which is the Federal requirement to drive a commercial truck safely. The DOT requirements for commercial truck drivers provide both the driver and the public with protection from the substantial risk of harm of allowing unqualified drivers to operate over the road trucks on the highways. Plaintiff was unqualified to perform the essential functions of driving a commercial truck safely.

Moreover, Albertsons was not legally required to accept a DOT vision waiver. Albertsons has the right to rely on

established Federal safety standards and should not be required to participate in an experimental study that waives vision requirements for commercial drivers. Without a legal obligation to accept vision waivers, Albertsons was under no legal duty to conduct an "individual assessment" of Plaintiff's abilities. To require Albertsons to conduct an "individual assessment" would be an exercise in futility because Plaintiff did not and could not meet the minimum Federal safety standards. To require employer participation in an experimental study would risk the safety of the drivers and the public. Further, to require Albertsons to accept substandard qualifications would subject it to the risks of liability presented by employing a driver who is below minimum standards set out by Federal law.

Albertsons offered Plaintiff alternative employment opportunities that became available, although it was not legally obligated to "reasonably accommodate" him.² Significantly, Plaintiff rejected at least one such offer of employment. Even if Albertsons were under a duty to accommodate in this case, it would not be required under the ADA to offer or give the employee the position of his choice.

The District Court for the District of Oregon granted Summary Judgment in favor of Albertsons. The court examined all the evidence in light of the non-moving party, Plaintiff, and found no genuine issues as to any material facts were presented. The court properly held as a matter of law in favor of Albertsons' Motion for Summary Judgment.

ARGUMENT

²Note that even if Albertsons had been so legally obligated, that obligation was only to accommodate Plaintiff to permit him to succeed in "the position" he had held or had applied for. 42 USC §12111(8) ("ADA"). When Albertsons offered Plaintiff positions other than over the road truck driver, the Company exceeded its legal obligations.

I. Whether The District Court Properly Granted Summary Judgment Finding There Were No Genuine Issues of Material Fact; Plaintiff Was Not a Qualified Individual With a Disability Under The Americans With Disabilities Act Because He Could Not Perform The Essential Functions of Driving a Commercial Vehicle.

Plaintiff brought his action against his former employer Albertsons claiming disability and perceived disability discrimination based upon his visual impairment under the ADA, 42 USC §12101, *et. seq.* The ADA prohibits employers from discriminating in the terms, conditions, and privileges of employment against a qualified individual with a disability. 42 USC §12112(a).

For Plaintiff to present a prima facie case under the ADA, he must show that (1) he is a disabled individual; (2) he is qualified, that is, he can perform the essential functions of the job with or without reasonable accommodation; and (3) defendant terminated him because of his disability. *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990) (prima facie elements under Rehabilitation Act, which the ADA patterns); *see also Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 996 (D. Or. 1994).

A. Plaintiff was not a "qualified individual" with a disability.

Albertsons moved and the District Court properly held as a matter of law that Plaintiff was not a "qualified individual" with a disability. Opinion p. 7, E.R. 218. Plaintiff failed to show any genuine issues of fact that he is a "qualified individual" with a disability. A "qualified individual with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual

holds or desires." 42 USC §12111(8).

The statutory definition of "qualified individual" is further clarified by regulations promulgated by the Equal Employment Opportunity Commission (hereafter "EEOC"). Under the EEOC regulations, determining whether a person is a "qualified individual with a disability" follows a two-step analysis. Appendix to 29 CFR §1630.2(m). The first step is to determine whether the person satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. *Id.* (emphasis added). The second step is to determine whether the individual can perform the essential functions of the position with or without reasonable accommodation. *Id.* (emphasis added). The determination should be based on the capabilities of the individual with a disability at the time of the employment decision. *Id.* Plaintiff bears the burden of demonstrating that he can perform the essential function of his job with or without reasonable accommodation. *Lucero* at 1371.

Plaintiff failed to satisfy the prerequisite minimum vision requirement for the position of a commercial vehicle truck driver, thus failing to meet his burden of showing in the first step of the analysis that he was a "qualified individual with a disability". The minimum vision requirements established by DOT for operators of commercial motor vehicles include, "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses ***." 49 CFR §391.41(b)(10).

On November 9, 1992, Dr. Douglas Eubanks found Plaintiff's acuity rating to be 20/200 in his left eye. Sturgill Dep. Exhibit 17, E.R. 143. The doctor noted that this had been Plaintiff's corrected vision rating in that eye "since birth". *Id.*

Plaintiff's medical examinations reveal that he has never met the minimum DOT vision requirements to drive a commercial vehicle, although various examiners wrongly "certified" him as DOT "qualified". Sturgill Dep. Exhibit 16, E.R. 142; Sturgill Dep. Exhibit 21, E.R. 145; Sturgill Dep. Exhibit 22, E.R. 146; Sturgill Dep. Exhibit 23, E.R. 147.

Plaintiff's brief paints Albertsons' request for recertification by medical exam as one with ulterior motives. The facts are far less exciting than Plaintiff imagines them. Albertsons treated plaintiff like any other driver returning from a long term injury, when it asked him to recertify. Sturgill Dep., pp. 52-53, Supp. E.R. 49-50; Riddle Dep. p. 30, Supp. E.R. 55. Albertsons' longstanding practice and policy has been to request drivers to recertify when they return from a long term injury. Sturgill Dep., pp. 52-53, Supp. E.R. 49-50; Riddle Dep. p. 30, Supp. E.R. 55. Plaintiff returned to work after an absence of nearly a year due to a compensable injury. See Kirkingburg Dep. pp. 37, 91, E.R. 37, 50. Therefore, when he returned from the injury he admitted that Albertsons asked him to recertify. Kirkingburg Dep. pp. 91-92, E.R. 50-51.

Dr. Douglas Eubanks brought it to Albertsons' attention that Plaintiff did not qualify under the DOT vision requirements. This was the first time that Dr. Douglas Eubanks examined Plaintiff. Kirkingburg Dep. p. 94, E.R. 52. At all times before, other doctors examined Plaintiff and filled out the certification card erroneously.³ There is no evidence in the record that Dr. Douglas Eubanks was anything other than

³On April 26, 1988, Dr. Gayle Sayler certified Plaintiff, having found right eye acuity of 20/15 and left eye acuity of 20/200. Sturgill Exhibit 21, E.R. 145. August 18, 1990, Robert Eubanks, D.O., certified Plaintiff with right eye acuity of 20/25 and left eye acuity of 20/70. Sturgill Exhibit 22, E.R. 146. February 5, 1991, Dr. Theresa Eubanks certified Plaintiff with right eye acuity of 20/25 and left eye acuity of 20/100. Sturgill Exhibit 23, E.R. 147.

more careful than previous physicians.

Plaintiff's arguments do not alter DOT vision requirements of corrected vision of at least 20/40 in each eye without corrective lenses or visual acuity separately corrected to 20/40 or better with corrective lenses. See 49 CFR §391.41(10). As the examining physician, Dr. Douglas Eubanks found Plaintiff did not meet the Motor Carrier Safety Regulations. Kirkingburg Dep. Exhibit 17, E.R. 143. It is undisputed that Plaintiff does not meet the prerequisite minimum standard set by DOT regulation, which has been in effect at all material times in this case. He confuses the issue of prerequisites in his opening brief. He argues that the DOT certification is the prerequisite to the position and not the physical vision requirements set by DOT. Plaintiff misses the fact that the DOT certification and the physical vision requirements set by DOT are intertwined: without meeting the minimum vision requirements, one is not DOT certified; to be DOT certified, one is required to meet or exceed the minimum vision requirements.

When Dr. Douglas Eubanks found that Plaintiff failed to meet the minimum vision requirements under DOT standards, he so advised Albertsons' Transportation Department on November 6, 1992. E.R. 143; Sturgill Dep. Exhibit 34, E.R. 157. Thus, Plaintiff failed to meet the minimum vision requirements and was not eligible for DOT certification as required by 49 CFR §391.41(b)(10). The only exceptions to DOT requirements have been instituted through the experimental waiver program study of the Federal Highway Administration.⁴

Plaintiff was unable to perform the essential functions of the position with or without reasonable accommodation and thus failed the second step of analysis as to whether he is a

⁴The waiver program was experimental, and Albertsons should not be required to adopt it. See Discussion at II, *infra*, p. 24.

"qualified individual with a disability". "Essential functions" are the fundamental job duties of the employment position the individual with a disability holds or desires. 29 CFR §1630.2(n). Essential functions of the job are those functions that bear more than a marginal relationship to the job at issue. Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994). Evidence of whether a function is essential include (1) evidence of the employer's judgment as to which functions are essential and (2) written job descriptions. 42 USC §12111(8). In weighing whether a function is essential, the EEOC further considers, but does not limit itself to: whether the position exists to perform a particular function, the amount of time spent on the job performing the function, and the consequences of not requiring the incumbent to perform the function. 29 CFR §1630.2(n). In this case, Plaintiff worked for Albertsons as an over-the-road truck driver of a commercial motor vehicle.

The essential function and purpose of the position is driving to transport groceries and other goods between states. The potential consequences of not requiring the incumbent over-the-road driver to conform to minimum standards are danger to the public and grave liability to the Company. See discussion regarding Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994), *infra*, p. 18. Thus, the accommodation sought by Plaintiff here (acceptance of a waiver of minimum safety standards) was not reasonable. *Id.*

The District Court properly gave weight to Albertsons' judgment as to what functions of Plaintiff's job are essential. 42 USC §12111(8). See Riddle Dep., Exhibit 2, p. 3, Supp. E.R. 65. The Company Driver Manual clearly states, "... you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." Riddle Dep. Exhibit 2, p. 3, Supp. E.R. 65. Albertsons considers the DOT minimum requirements for interstate truck driving an essential requirement to perform the function of

interstate driving. Affidavit of Jardine ¶¶2, 5, Supp. E.R. 68-69; Affidavit of King ¶¶2, 4, Supp. E.R. 66-67. The District Court found that Albertsons acted properly when it considered meeting DOT minimum requirements essential to Plaintiff's job of interstate truck driving. Court Opinion p. 7, E.R. 218.

The Fifth Circuit has applied a two part inquiry to determine whether an individual is "otherwise qualified" for a given job under the Rehabilitation Act of 1973⁵. Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994). The burden lies with the plaintiff to show that he is otherwise qualified. Chandler at 1394. The first inquiry is whether the individual could perform the essential functions of the job. *Id.* at 1393. Under Etheridge v. State of Alabama, 860 F.Supp. 808 (M.D. Ala. 1994) (ADA claim), the Alabama District Court followed the first inquiry by determining if the individual satisfied the requisite skill, experience, education and other job-related requirements of the employment position. Etheridge at 818 (citing 29 CFR §1630.2(m)).

"Essential functions" are defined as the fundamental job duties of the employment position the individual with a disability holds or desires. 29 CFR §1630.2(n). Further, "essential functions" are those that an employee must be able to perform. Etheridge at 816. The function may be essential because the reason the position exists is to perform that function. 29 CFR § 1630.2(n)(2)(i). Evidence of whether the particular function is essential includes, but is not limited to, the employer's judgment as to which functions are essential. 29 CFR §1630.2(n)(3)(i). The District Court properly held that Albertsons was legally entitled to consider meeting DOT minimum requirements essential to Plaintiff's job. E.R. 218.

The second inquiry of Chandler is only reached if the

⁵ Congress intended that the case law established under the Rehabilitation Act be used in deciding ADA cases. 42 USC §12117(b).

Court concludes the individual could not perform the essential functions of the job. Chandler at 1393. That inquiry is whether any reasonable accommodation would enable the individual to perform the essential functions of the job. Id. at 1393-1394. There were no possible reasonable accommodations that would have allowed Plaintiff to perform the essential functions of driving a commercial vehicle. See discussion at II, infra.

B. Plaintiff failed to produce any material issue of fact that he was a "disabled individual" as defined under the first prong of the ADA.

Although not addressed directly by court below, Plaintiff must first establish that he is "disabled" within the meaning of the ADA. A "disability" means a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. 29 CFR §1630.2(g)(1)-(3) (emphasis added). Plaintiff failed to bring forward any material issues of fact that he is substantially limited in the major life activity of working or seeing.

With respect to the major life activity of *working*, according to the EEOC, "substantially limited" in a major life activity means,

"significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 CFR §1630.2(j)(3)(i).

Plaintiff admits his visual acuity has always been 20/200 in his left eye. Kirkingburg Dep., p. 43, Supp. E.R. 2; Kirkingburg Affidavit ¶ 2, E.R. 18. Historically, his vision condition has

never prevented him from the major life activity of working.⁶ Kirkingburg Dep., p. 46, E.R. 38.

"The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 CFR §1630.2(j)(3)(i). Plaintiff must show and demonstrate that he is disabled in a more general sense than an inability to return to a particular job and that the limitations substantially impair the major life activity of working to establish his prima facie case under the ADA. Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir. 1994), cert. denied, 115 S. Ct 1104 (1995). At the district court level in Bolton, the court drew the analogy,

"[T]he mere fact that the average person on the street could not play fullback on the New York Giants without some assistance does not mean that he or she is handicapped as defined by the ADA." Bolton v. Scrivner, Inc., 836 F.Supp. 783, 788 (W.D. Okl. 1993).

Thus, because Plaintiff was able to perform many other jobs with his lifelong vision deficiency, he was not legally "disabled" from working.

Likewise, Plaintiff failed to bring forward any evidence that his major life activity of seeing was substantially limited. Plaintiff did present evidence showing that he was visually

⁶Plaintiff trained and worked as a jet aircraft mechanic and crew chief to the basic air commander (1957-60), worked as an auto mechanic for Los Angeles County (1968-78 or 1979), worked as a employee truck driver and independent truck driver (approximately 1974-81), obtained a contract with the county as a garbage hauler (approximately 1981-1989), and worked as a truck driver for Pastega Trucking (1990). Kirkingburg Dep. pp. 12-13, E.R. 30-31; p. 149, E.R. 57; pp. 151, 154. E.R. 59, 62; pp. 156-157, E.R. 64-65; pp. 161-162, E.R. 68-69.

impaired with monocular vision.⁷ Michel Dep. p. 27, E.R. 208. However, he failed to present any evidence that he was substantially limited in the major life activity of seeing. "Substantially limited" means "unable to perform a major life activity that the average person in the general population can perform." 29 CFR §1630.2(j). Factors considered in weighing whether an individual is "substantially limited" include: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or expected permanent or long term impact of or resulting from the impairment. 29 CFR §1630.2(j)(2)(i)-(iii). Plaintiff failed to bring forward any evidence that his vision prevented him from activities an average person can perform (except safely driving a big truck in interstate commerce). Nor did he present testimony as to the nature or severity of the impairment, other than establishing that he had visual acuity of 20/200 (with corrective lenses) in his left eye, which he claims he has had since birth. Kirkingburg Dep., p. 43, Supp. E.R. 2; Kirkingburg Affidavit ¶2, E.R. 18; Sturgill Dep. Exhibit 17, E.R. 143. Plaintiff's right eye was found to be 20/20 with corrective lenses. Sturgill Dep. Exhibit 17, E.R. 143.

Plaintiff, in his opening brief, cites three cases to support his argument that he was a "disabled" individual. Plaintiff Br. pp. 12-13. Each of these three cases is distinguishable from this case because each plaintiff in those cases was substantially impaired in both eyes.⁸ Plaintiff is not.

⁷Significantly, under 49 CFR §391.43, medical examiners are specifically instructed that, "Monocular drivers are not qualified to operate commercial motor vehicles under existing Federal Motor Carrier Safety Regulations."

⁸Plaintiff argues under the Rehabilitation Act a "legally blind" individual is a "handicapped individual". Plaintiff Br. pp. 12-13. He relies on Norcross v. Sneed, 573 F.Supp. 533 (W.D. Ark. 1983), aff'd,

In the case at hand, there is no dispute that Plaintiff had terrible vision in his left eye. However, no expert testimony was given to indicate that Plaintiff was "legally blind". His vision in his right eye is not "legally blind" at 20/20 with corrective lenses, not to mention that his combined acuity -- while deficient under DOT standards -- was never "legally blind". See Sturgill Dep. Exhibit 17, 143. Plaintiff did not assert and brought forward no evidence to show a substantial limitation of the "major life activities" of seeing. Therefore, Plaintiff was not "disabled" as defined under the ADA.

II. Whether the District Court Properly Held That No Reasonable Accommodation Was Possible and Specifically That Defendant Was Not Legally Obligated to Accept Department of Transportation Vision Waivers of Minimum Acuity Ratings.

A. Allowing Plaintiff a leave of absence to obtain a DOT vision waiver or requiring Albertsons to accept the DOT waiver would not be a reasonable accommodation.

556 F.2d 184 (8th Cir.), although that individual was legally blind in both eyes. Plaintiff also cited Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D. Pa. 1976, aff'd, 556 F.2d 184 (3d Cir. 1977) (individual was blind) for the proposition that a blind person is a handicapped person under the Rehabilitation Act. There is no evidence that Mr. Kirkingburg is "blind". Finally, he relied on Sharon v. Larson, 650 F.Supp. 1396 (E.D. Pa. 1986), although that individual's vision was 20/120 in the right eye and 20/300 in the left eye with conventional corrective lenses and the best combined acuity with conventional lenses was 20/100. Further, in Sharon there was no dispute (between parties) whether that plaintiff was handicapped, and the principal issue focused on whether Plaintiff was "otherwise qualified" to meet the state's minimum vision requirements for a driver's license. Id. at 1398, 1401.

Plaintiff argues that Albertsons should have reasonably accommodated him by allowing him a leave of absence to obtain a vision waiver. Assuming *arguendo* that Plaintiff was a qualified individual with a disability who with or without reasonable accommodation could perform the essential functions of the job --which he was not-- the ADA does not require an employer to accept a vision waiver.

Plaintiff argues that he should have been granted leave to obtain a vision waiver and Albertsons should have accepted the waiver and considered him "qualified" to drive by virtue of his eligibility to participate in the FHWA experimental study. To accept such argument would wrongly require an employer to take part in an FHWA experimental study, at the risk of harm to itself and to the traveling public. Nothing in the ADA requires an employer to become an unwilling participant to such an experiment.

In fact, the experimental vision-waiver program was invalidated and vacated on August 2, 1994. Advocates for Highway Safety v. Federal Highway Administration, 28 F.3d 1288, 1294 (D.C. Cir. 1994). The FHWA had adopted the waiver program contrary to law. *Id.* The court found that FHWA failed to determine that a waiver was consistent with the safe operation of commercial motor vehicles. *Id.*

On February 28, 1992, the FHWA published an "advance notice of proposed rulemaking," inviting public comment on "the need, if any, to amend its driver qualification requirements relating to the vision standard," 57 Fed. Reg. 6793. On March 25, 1992, before the time for public comment had expired, the FHWA announced the implementation of a temporary vision waiver program for certain drivers, including those who were blind in one eye. 57 Fed. Reg. 10295. Following heavy criticism, the agency published a third notice inviting public comment "on its intent to waive its vision requirements for drivers that meet certain conditions," and stating that

"the proposed waiver program will enable the FHWA to conduct a study comparing a group of experienced visually deficient drivers with a control group of experienced drivers who meet the Federal vision requirements." 57 Fed. Reg. 23370 (June 3, 1992).

Subsequently, the FHWA instituted the program to issue temporary waivers. 57 Fed. Reg. 31458 (July 16, 1992).

In Advocates for Highway Safety v. Federal Highway Administration, 28 F.3d 1288, 1294 (D.C. Cir. 1994) the federal Court of Appeals for the District of Columbia Circuit threw out the FHWA waiver program. The court held that the agency violated its mandate to grant waivers from established physical qualification standards only where it found that such waivers were "not contrary to the public interest and *** consistent with the safe operation of commercial motor vehicles." 28 F.3d at 1293, citing 49 USC App. §2505(f). The court noted that the FHWA admitted (in its final notice implementing the waiver program) that it had no empirical data "to establish a link between vision disorders and commercial motor vehicle safety," and that the waiver program itself was intended to provide this data by allowing the agency to conduct a study that would

"provide the empirical data necessary to *** permit the FHWA to properly evaluate its current vision requirements *** and, if necessary, establish a new vision requirement ***." 57 Fed. Reg. at 31458.

The FHWA proposed the waiver program as an experiment to see how safe (or unsafe) drivers who did not meet the current vision standards in 49 CFR §391.41(b)(10) might be.

On November 17, 1994, the FHWA published a "Notice of Final Determination and change in research plan." 59 Fed. Reg. 59386 (emphasis added.) This notice continued existing temporary waivers until March 31, 1996, subject to certain

reporting and monitoring conditions for maintaining the waivers. In this notice, the FHWA acknowledged that its vision waiver "study as presently fashioned has some problems *** [and] that its group of waived drivers may include some subpar performers who individually may present an unacceptable risk to safety." *Id.* at 59388. In particular, the FHWA admitted that problems with monitoring of the study led to under reporting of the number of fatal accidents involving drivers with vision waivers, and in fact the rate of fatal accidents for this group had been higher than previously believed. *Id.* at 59388-89. The agency also conceded that "the study, as currently designed, will not produce, by itself, sufficient evidence upon which to develop a new vision standard" to replace the current one in 49 CFR §391.41(b)(10). *Id.* at 59388. In fact, the agency stated that the original vision standard (relied on by Albertsons) would remain in effect until the completion of the research and the implementation of any new standard. *Id.* at 59390.

Plaintiff has suggested that a leave of absence would be a reasonable accommodation (citing *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994)). Plaintiff Br. p. 18. Plaintiff misses the critical analysis on which the plaintiff in *Schmidt* focused. The plaintiff in *Schmidt* requested a leave of absence while he underwent treatment for his alcoholism. *Id.* at 997 (emphasis added). In the case at hand, Plaintiff's physician stated by letter to DOT,

"The reduced acuity in the left eye is due to amblyopia (ICD-9 368.0). Amblyopia is low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease." Sturgill Dep. Exhibit 24, E.R. 148. (Emphasis added.)

The record reflects no evidence and there is no dispute that Plaintiff's condition is uncorrectable and not treatable.

Plaintiff essentially argues that Albertsons should accept

his waiver of the federally mandated requirements as outlined in 49 CFR §391.41(b)(10). Under *Buck v. United States Department of Transportation*, 56 F.3d 1406, 1408 (D.C. Cir. 1995) (Rehabilitation Act did not require FHWA to perform individual assessments of truck drivers who failed DOT hearing requirements), the Court found that when the Federal Highway Administration established certain safety standards and there was no way an individual with a certain handicap could meet the standard, the law did not require the pointless exercise of allowing him to try (to meet the standard). *Buck* at 1408. "Once an individual has admitted that he does not meet such a necessary - as opposed to a merely convenient - standard, the Rehabilitation Act does not forbid the application to him of a general rule." *Id.*

To hold that Albertsons would be required to allow Plaintiff leave to obtain a waiver would be an exercise in futility since he could not meet the minimum vision requirements even with the waiver. The District Court correctly pointed out if Albertsons were required to accept the DOT waivers, in the event of an accident, it would be put in the indefensible position of justifying the decision of allowing a driver who did not meet the minimum vision requirements to drive a commercial vehicle. E.R. 218-219. The Fifth Circuit has held, as a matter of law, that a driver with insulin dependent diabetes or with vision that is impaired to the extent discussed in 49 CFR §391.41 presents a substantial risk that he could injure himself or others. *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994). "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident." *Id.* at 1395 (quoting *Collier v. City of Dallas*, No. 86-1010, slip op. at 3 (5th Cir. 1986) (unpublished)). In the case at hand, the lower court correctly reasoned that employers are not required to offer accommodations that are likely to be futile because even with the accommodation, the employee could not safely and

efficiently perform the functions of the job. E.R. 218; citing Schmidt at 997; Buck at 1408 (D.C. Cir. 1995).

- B. Although it was not required to reasonably accommodate Plaintiff, Albertsons made reasonable offers to Plaintiff for other positions available.

The ADA does not impose upon an employer any affirmative duty to find another job for an employee who is no longer qualified for the job he or she was doing, but requires an employer not preclude an employee from alternative employment opportunities reasonably available under existing policies. Marschand v. Norfolk and Western Railway Company, 876 F.Supp. 1528, 1542 (N.D. Ind. 1995) (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n. 19, 107 S.Ct. 1123, 1131-32 n. 19, 94 L. Ed.2d 307 (1987)). While Albertsons did not believe Plaintiff was "otherwise qualified" to drive a commercial vehicle, it still considered him for and offered to him other jobs. King Affidavit ¶5, Supp. E.R. 67. Plaintiff admitted the position of Yard Hostler (moving trailers at the Distribution Center) was offered to him (Kirkingburg Dep. p. 77; Supp. E.R. 3). Plaintiff also admitted he was offered the position of Tire Man. Kirkingburg Dep. pp. 84-85; Supp. E.R. 4-5. The position of Yard Hostler was withdrawn after it was offered to (but not accepted by) Plaintiff when Albertsons became aware that the position required DOT certification. Riddle Dep. p. 55, Supp. E.R. 60. Plaintiff refused the Tire Man position. Kirkingburg Dep. pp. 85-87, Supp. E.R. 5-7, Norris Dep. p. 18, Supp. E.R. 42. Even under "reasonable accommodation" duties, employers are not required to offer employees the position of their choice. Marschand at 1543. "The bottom line . . . is simply that the employer must offer the employee a reasonable accommodation." Id. (citing Kerno v. Sandoz Pharmaceuticals Corp., 1994 WL 511289 (N.D. Ill. 1994)).

Even if there was a duty to reasonably accommodate,

Albertsons met it. Here there was no such duty because Plaintiff was not "otherwise qualified".

III. Whether the District Court Properly Held That Defendant Could Rely on Department of Transportation Vision Standards and Need Not Make an Individual Assessment of Plaintiff's Ability to Drive a Commercial Vehicle.

Plaintiff's argument that Defendant should have made an "individualized assessment" of his visual impairment was correctly rejected by the lower court. The lower court properly held as a matter of law that (1) Albertsons could rely upon the DOT vision standards and (2) that Albertsons did not need to make an individual assessment of Plaintiff's ability to drive. Court Order and Opinion, p. 8, E.R. 219. (The lower court cited to Buck at 1408-1409 (Federal Highway Administration (hereafter "FHWA") stating employers are not required to make individualized assessment of deaf truck drivers who did not meet established physical qualification standards in 49 CFR §391.41(b)(11)); Ward v. Skinner, 943 F.2d 157 (1st Cir. 1991), cert. denied, 503 U.S. 959 (1992) (FHWA was not required to make individualized assessment of driver who did not meet physical qualification standards of 49 CFR §391.41 because of history of epilepsy). The FHWA's undertaking of an experimental vision-waiver study does not change the analysis when the FHWA itself has not proposed, much less implemented, any changes to the visual acuity standards in its regulations.⁹

⁹Nor is it relevant that the plaintiff had driven previously as a truck driver when he was erroneously certified as qualified to drive under the FHWA's regulations in the past. It is also irrelevant whether Plaintiff's doctor determined his condition would not interfere with his ability to drive or that he was not asked to submit to another exam or gathering his medical history.

The ADA allows employers to rely on established federal health and safety standards in setting minimum qualifications for jobs. The established federal standard for visual acuity for commercial motor vehicle operators is set out in 49 CFR §391.41(b)(10). The Company adopted this standard as a minimum qualification for its truck drivers. Albertsons has always deferred to the medical certifications of its examining physicians, as evidenced by their completion of the DOT certification cards. Jardine Affidavit ¶4, Supp. E.R. 68-69; Sturgill Dep. pp. 24, 34, Supp. E.R. 46, 49. However, Plaintiff never met the vision standard therefore never was "otherwise qualified" for the job of truck driver. In order for this Court to find that plaintiff was ever "qualified," it would have to hold that Albertsons is under some legal obligation to participate in the FHWA vision-waiver experiment. It was not.

The lower court properly held that the law does not impose an obligation for an employer to accept a waiver. Court Opinion p. 8, E.R. 218. Plaintiff has not identified anything in the ADA to the contrary. The FHWA notice of November 17, 1994 makes it quite clear that the purpose of the waiver program was to provide some data to indicate just how safe these drivers are. The notice also makes it clear that previous FHWA monitoring of the drivers' performance had left much to be desired. The ADA does not mandate employer participation in such federal experiments, and certainly does not require Albertsons to accept the risks of liability presented by employing a driver who is below the minimum standards set out in Federal law.

Plaintiff argues on appeal that Chandler, supra, should be discounted under Sarsycki v. United Parcel Service, 862 F.Supp. 336 (W.D. Okl. 1994), because it is a post-Chandler

Clearly, the employer cannot be held responsible for the physicians' disregard for the standards nor does it change the fact that Plaintiff does not meet the standards currently set out in 49 CFR §391.41(b)(10).

case that is

"undermined by the fact that the FHWA has recently instituted a waiver program for . . . drivers of commercial motor vehicles which the FHWA believes is 'consistent with the safe operation' of those vehicles." Sarsycki at 341.

Plaintiff's premise is undermined by the fact that the experimental vision-waiver program referred to in Sarsycki was invalidated on August 2, 1994. See Advocates for Highway Safety v. Federal Highway Administration, 28 F.3d 1288, 1294 (D.C. Cir. 1994). The Advocates for Highway Safety court specifically found that the Federal Highway Administration adopted the waiver program contrary to law as it failed to determine that a waiver would be consistent with the safe operation of commercial motor vehicles. Id. (emphasis added). The agency on remand examined the rule and corrected the defect, but admitted, "flaws in the current research method ***[and] the data developed by the study will never answer the question as to what the standards should be." 59 Fed. Reg. 59389.

The lower court relied on Chandler, which found that a truck driver with impaired vision who does not meet DOT vision requirements cannot be reasonably accommodated because he presents a genuine substantial risk that he could injure himself or others. E.R. 219; Chandler at 1395. A "direct threat" determination was not required as outlined in 29 CFR §1630.2(r), since the lower court found, as a matter of law, Plaintiff's vision impairment was a "significant risk of substantial harm to the health or safety of the individual or others." Chandler at 1395. Consequently, an employer is not required to accept a waiver.

IV. Whether the District Court Properly Held That Defendant Was Not Required to Make a Reasonable Accommodation by Transferring Plaintiff to a Yard Hostler Position or Some Other Available and Suitable

Position.

Plaintiff on appeal raises a new issue, not raised below or contained in his Amended Complaint, that he had a state statutory right to reinstatement. *See* Amended Complaint, E.R. 1-3; Court Order and Opinion, E.R. 211-220; Court Denial for Reconsideration Order, E.R. 223-225. Further, Plaintiff now tries to link this previously unraised issue to a duty to reasonably accommodate Plaintiff by facilitating his return to work. Finally, Plaintiff now argues that under the state law for injured worker reinstatement, Albertsons had a legal obligation to return Plaintiff to his former position or a suitable alternative. This Court should not consider Plaintiff's argument, as it is being raised for the first time on appeal. *See Spurlock v. F.B.I.*, 69 F.3d 1010, 1017 (9th Cir. 1995).

Assuming Plaintiff could now raise arguments under ORS §659.415, claiming he had reinstatement rights to his former position under state workers' compensation law, his argument would fail. Reinstatement rights to the worker's former position of employment are invoked, "upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position." ORS §659.415(1). (Emphasis added.) Under Oregon Administrative Rules interpreting ORS §659.415, one requirement is that the injured worker must be physically able to perform the duties of the former position. O.A.R. 839-06-130(1)(b). As discussed above, Plaintiff did not meet the physical vision requirements and thus could not perform the essential duties of the position. Therefore, Plaintiff was not covered under ORS §659.415.

Plaintiff also claims belatedly, under ORS §659.420, that he had reinstatement rights.¹⁰ To qualify under

¹⁰Citing both ORS §659.415 and ORS §659.420, Plaintiff argues that he had a right to his former job or, if unavailable, another

ORS §659.420, Plaintiff essentially must argue he was disabled from performing the duties of his former job. Plaintiff cannot logically make that argument without undoing his prior arguments. Additionally, Plaintiff did not show below that there was an "available and suitable" position when he was terminated.¹¹ Court Order p. 2, E.R. 224. There is nothing in the record on this point.

Further, Plaintiff was offered the position of Tire Man, which he rejected. Kirkingburg Dep. pp. 84-85, Supp. E.R. 4-5. Under both ORS §659.415(3)(a)(D) and ORS §659.420(3)(d), the right to reinstatement and reemployment (respectively) terminates when the worker "refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming

which was available and suitable. Plaintiff's Br. p.2. This mistakes the intent of ORS §659.420.

¹¹No material factual evidence was presented and the lower court properly found, "plaintiff has not shown that the yard hostler position was vacant when he was terminated. Even if the yard hostler position was vacant, driving was an essential function of that job." Court Denial for Reconsideration Order p. 2, E.R. 224 (emphasis added).

Also the lower court properly found, "An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Court Order and Opinion, p. 7, E.R. 218. (*Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994)). *See also, Marschand v. Norfolk and Western Ry. Co.*, 876 F. Supp. 1528, 1543 (D. Ind. 1995) (employer not required to reassign disabled employee to vacant position unless employee is qualified for position). Court Denial for Reconsideration Order, pp.2-3, E.R. pp. 224-225.

medically stationary."¹²

CONCLUSION

For the foregoing reasons, the decision of the District Court for the District of Oregon granting Appellee Albertsons' Motion for Summary Judgment should be affirmed.

DATED this 8th day of October, 1996.

Respectfully submitted,

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(Certificate of Service omitted in printing)

¹²Further, more than three years have passed since Plaintiff's injury (December 21, 1991, *See* Kirkingburg Dep. pp. 37, 91, E.R. 37, 50), which would terminate any right to reinstatement or reemployment under both ORS §659.415(3)(a)(F) and ORS §659.420(3)(f).

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Supreme Court, U.S.
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No. 98-591

In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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(Caption omitted in printing)

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

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REPLY ARGUMENT

I. Plaintiff Raised A Genuine Issue Of Fact As To Whether He Was A Qualified Individual With A Disability Under The Americans With Disabilities Act.

A. Plaintiff Was A "Qualified Individual"

Under the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et. seq.*, a "qualified individual with a disability" is one who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The analysis under the ADA is two-step: First, whether the individual satisfies the prerequisites for the position; and, second, whether or not the individual can perform the essential functions of the position held with or without reasonable accommodation. 29 C.F.R. § 1630.2(m). Although Defendant agrees that this two-step analysis is appropriate under the ADA, *see* Defendant's Answering/Opening Brief ("Defendant's Brief") at 12, Defendant's argument repeatedly muddles the two stages. Under Defendant's intermingling of the two steps, the prerequisite of DOT certification becomes an essential function of the job of truck driving. That muddled analysis is flawed.

The first step, which is the determination whether an individual satisfies the prerequisites of a position held or desired, raises the issue of whether the individual possesses "the appropriate educational background, employment experience, skills, licenses, etc." Appendix to 29 C.F.R. §

1630.2(m).

Here, Plaintiff possessed the necessary prerequisites. He possessed the appropriate employment experience, he had years of employment driving trucks from 1979 through 1992. Plaintiff's Opening Brief at 3. He possessed the appropriate educational background having obtained an associates degree. CR 27 at 16. He possessed the necessary skills, for he had a good driving record, had never been in an accident that was his fault and had no disqualifying moving violations on his record. Plaintiff's Opening Brief at 3-4. According to his doctor the amblyopia in his left eye does not interfere with his ability to drive. CR 27 at 9, 137; Aff. Of Beatrice Michael; Ex. 24. Finally, Plaintiff possessed the appropriate licenses, for he either held a valid DOT card or later obtained a DOT vision waiver and obtained such a card. CR 27, 31, 32, 117, 119, 136. Thus, Plaintiff possessed the necessary prerequisites of the job including a valid DOT card, that is DOT certification. As demonstrated in Plaintiff's Opening Brief there is a question of fact as to whether the DOT certification or the vision acuity provisions within DOT regulations constitute the legitimate prerequisites of the job. Plaintiff's Opening Brief at 14-15.

Plaintiff's undisputed satisfaction of the prerequisite of a DOT card is why Plaintiff's argument that the DOT certification was Defendant's prerequisite, and not the underlying DOT vision specifications, is compelling at summary judgment. If the DOT certification is the prerequisite, not the vision requirements themselves, then a DOT vision waiver is a reasonable accommodation and an individual assessment is necessary. See discussion of reasonable accommodation, *infra*. Here, it is undisputed that an individual assessment was not made. In any event, Defendant fails to negate the question of fact raised by Plaintiff as to whether the DOT certification was Defendant's prerequisite for the job as opposed to the physical vision acuity specifications set forth by DOT in 49 C.F.R. §

391.41(b)(10).¹

As demonstrated in Plaintiff's Opening Brief, at pages 14-15, there is a question of fact as to whether it is DOT certification that is a prerequisite to the position, or whether the prerequisite is meeting the underlying physical requirements for vision acuity contained in DOT regulations. The evidence adduced, viewed in the light most favorable to Plaintiff, is that Defendant's drivers are to be certified by the Department of Transportation and that Defendant never specifically adopted DOT's physical requirements as Defendant's own. Nor did it enforce those physical requirements regarding Plaintiff prior to his injury. CR 27, p. 82-84, 109, 115. Struggle as Defendant does in its Brief it fails to dispel the question of fact raised by Plaintiff as to whether the DOT vision requirements themselves are the prerequisites. Defendant cannot avoid that Plaintiff was hired to drive in 1990 despite a recorded corrected vision that did not meet DOT specifications and permitted to drive in 1991 despite a worse recorded corrected vision and that these reports of supposedly deficient vision did not disqualify Plaintiff. CR 27, at 60-62, 110, 111-112, 115-116, 119, 123-124, 136; CR 44 at 5-9; ER 181-186. Indeed, Mr. Riddle testified Defendant would accept changes in DOT minimum requirements, thus indicating it was DOT certification, not the specified vision acuity standards, that was the prerequisite to the job. CR 27, p. 84. Despite Defendant's efforts there remains a question of fact as to whether Plaintiff met the legitimate prerequisites of the position, or could have with the accommodation of leave to obtain, and acceptance of, a DOT vision waiver.

¹49 C.F.R. § 391.41(b)(10) provides in part: "Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses"

The second step of the analysis of whether an individual is a qualified individual with a disability requires an examination of whether Plaintiff could perform the essential functions of the job held or desired. When defined properly the essential function of the job in question was interstate truck driving. Plaintiff's Brief at 16; Defendant's Brief at 17 ("The essential function and purpose of the position is driving to transport groceries and other goods between states."). The undisputed fact is that Plaintiff had satisfactorily performed those essential functions for Defendant from August 21, 1990 through December 3, 1991, and had performed similar jobs successfully for years before his employment, with the vision impairment he had since birth. See Plaintiff's Opening Brief at 16-17. There is at least a question of fact as to whether Plaintiff could perform the essential functions of the job of interstate truck driving.

B. Plaintiff Was A Disabled Individual. His Vision Impairment Was Regarded As Substantially Limiting Seeing Or Working

On appeal, Defendant for the first time raises the issue of whether Plaintiff was a disabled individual under the ADA. Def.'s Brief at 20-24. Having not raised this issue below Defendant should not now be allowed to argue the record is deficient regarding this issue.² See *Spurlock v. F.B.I.*, 69 F.3d

²In Plaintiff's Memorandum In Opposition To Defendant's Motion For Summary Judgment, CR 26 at p. 11, Plaintiff stated, "Here, Defendant does not challenge that Plaintiff's vision impairment qualifies as a physical impairment under the ADA; rather Defendant argues Plaintiff is not an otherwise qualified individual." Defendant did not refute that statement in its Reply. CR 42. Indeed, in its Reply Defendant states, "Albertson's moves for summary judgment in its favor on the ground that Mr. Kirkingburg was not 'otherwise qualified' to perform the job of truck driver with or without reasonable

1010, 1017 (9th Cir. 1995).

Despite the fact that Defendant did not raise the issue below, Plaintiff adduced evidence that he was a disabled individual under the Act. A disability means a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102(2) (emphasis supplied); see 29 C.F.R. § 1630.2(g)(1)-(3). Here, Plaintiff presented evidence establishing that he had 20/200 corrected vision in his left eye and 20/20 corrected vision in his right eye. CR 27, p. 9; ER 22. That physical impairment is not disputed. Significantly, in addition, there is evidence that Mr. Riddle regarded Plaintiff as "legally blind or blind in one eye." CR 27 at 110; Sturgill Depo. 25; ER 121. Someone who is, or is regarded as, legally blind or blind is disabled under the ADA. See *Norcross v. Sneed*, 573 F.Supp. 533, 536 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir.) (legally blind individual is handicapped under the Rehabilitation Act); *Gurmankin v. Costanzo*, 411 F.Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3rd Cir. 1977). Mr. Riddle's statement that Plaintiff was "legally blind or blind in on eye" is evidence he regarded Plaintiff as having an impairment that substantially limited the life activity of seeing. Under the statutory definition of disabled, being so regarded is sufficient for Plaintiff to be protected under the ADA. Plaintiff need not prove his impairment actually limited major life activities.

Mr. Sturgill's testimony that there was no other reason than Plaintiff's vision impairment for Plaintiff's termination is evidence that Plaintiff was regarded as having an impairment that substantially limited the major life activity of working. Due to Plaintiff's vision impairment he was regarded as unable to perform an entire class or type of work, that is,

accommodation." CR 42, at 2; Memorandum In Support Of Amended Motion For Summary Judgment.

interstate truck driving or any other position involving driving. Being regarded as unable to perform a class or type of work due to an impairment is sufficient to be regarded as having an impairment that substantially limits the major life activity of work. 29 C.F.R. § 1630.2(j)(3)(I); *Leslie v. St. Vincent New Hope, Inc.*, 916 F.Supp. 879, 885 (S.D. Ind. 1996) (inability to perform a "wide range of jobs" is sufficient to substantially limit working); see *E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088 (D. Haw. 1980) (under Rehabilitation Act the standard of limits employment does not mean limits employment generally); see also *Winnett v. City of Portland*, 118 Or. App. 437, 447, 847 P.2d 902 (1993) (under Oregon disability discrimination law patterned on the Rehabilitation Act an impairment that substantially limits the performance of "the work involved" satisfies the statutory criteria of a disability).

Here, there is evidence that Plaintiff was excluded from any job with Defendant involving driving not just one particular truck driving job. Thus, Defendant's reliance on *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1104 (1995) is misplaced. This is not a case where the "single job" exclusion to substantially limiting working, as articulated in 29 C.F.R. 1630.2(j)(3)(I), applies. See *Leslie, supra* (distinguishing *Bolton, supra*). Thus, Defendant's argument that Plaintiff is not disabled under the ADA is factually and legally flawed and should be rejected by this court, if this court addresses it at all.

II. The District Court Erred By Holding As A Matter Of Law There Was No Reasonable Accommodation Possible.

A. A Vision Waiver Is A Reasonable Accommodation

The district court's holding that "[n]o reasonable accommodation is possible" implicitly relies upon its finding that the "vision waiver program is a flawed experiment that

has not altered the DOT vision requirements." CR 48, Opinion at 7, at ER 218. The district court, and Defendant in its Brief, rely heavily upon the holding in *Advocates for Highway Safety v. Federal Highway Administration*, 28 F.3d 1288 (D.C. Cir. 1994). Both the court and Defendant read *Advocates* too broadly. In *Advocates* the court did not rule the vision waiver was flawed or risked public safety. Rather, the court concluded that "The FHWA [Federal Highway Administration] has failed to meet the exacting requirements of section 2505(f)," which sets forth the prerequisites of granting a waiver. 28 F.3d at 1294. The court therefore held that the FHWA's adoption of the waiver program was contrary to law and it vacated and remanded the rule to the agency. *Id.* In short, the court did not invalidate the principle of a vision waiver program, it simply held the FHWA had not met the legal requirements of establishing one at the time it had created the program.

On remand the agency determined that it would continue vision waivers for the approximately 2,399 drivers in the program, thus including Plaintiff, until March 31, 1996. 59 Fed. Reg. 59386, 59387 (1994). Although the district court and Defendant on appeal acknowledge the agency's action, both fail to recognize the significance of the agency's final determination. In the agency's final determination entitled "Qualifications of Drivers; Vision Deficiencies; Waivers" it determined:

"that the issuance of waivers to the 2,399 drivers [thus including Plaintiff] remaining in the study group is consistent with the public interest and the safe operation of commercial motor vehicles. This determination is based on studies referred to herein and data gathered during the course of the last two years which support the proposition that a group of experienced drivers of commercial motor vehicles with clean driving records, including both accident and citation records over the previous three years, will

present a lower risk to safety over the following three years than a group of the same size comprised of drivers representing the general truck driving population, including new drivers, over the same three-year period. The statistics that have been gathered from the waived drivers to date indicate that this class of drivers has performed and continues to perform more safely than those drivers in the general population of commercial drivers.

* * *

In addition, the FHWA believes that the continued employment of individuals with proven safe driving records is in the public interest. . . . Permitting waived drivers to continue operating in interstate commerce is also consistent with the public interest policy of employing persons with disabilities, which is evidenced in both the Rehabilitation Act of 1973 and the Americans with Disabilities Act."

59 Fed. Reg. 59386, 59389, *see* Appellant's Addendum page 15.³ Thus, on remand the agency determined that continuation of the vision waiver program was consistent with the public interest and the safe operation of commercial vehicles. Given this determination, the district court erred when it held as a matter of law that the proposed accommodation of a vision waiver would be futile because even with that accommodation

³Notably, one of the comments favoring continuing the vision waiver program from the State of Indiana Department of Motor Vehicles "emphasizes the importance of the vision waiver as a tool to accurately assess the vision standards of commercial drivers, specifically addressing the condition known as amblyopia, or 'lazy eye.' The State acknowledges that persons with less than perfect vision often develop scanning techniques to compensate for their disability, and that such techniques may actually increase their awareness of traffic and other conditions." 59 Fed. Reg. *supra* at 59386-59387.

or any other, Plaintiff could not safely perform the essential function of truck driving. The Department of Transportation had determined that the screening requirements of the vision waiver program would meet the safety requirements dictated by the public interest and thus in certain cases the vision requirements of 49 C.F.R. § 391.41(b)(10) need not be met. Given the Department of Transportation's position regarding the alternative vision standards set forth in the vision waiver program, the issue of possible reasonable accommodation should not have been decided as a matter of law. Generally, the reasonableness of an accommodation is an issue for the jury. *Schmidt v. Safeway, Inc.*, 864 F.Supp. 991, 997 (D. Or. 1994).

Properly analyzed, the issue of "direct threat to safety," as established in 42 U.S.C. § 12113(b) and explained in 29 C.F.R. § 1630.2(r), is a defense with the burden on the defendant to establish the significant risk of substantial harm to the health or safety of the individual or others. *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996) ("As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat."); *E.E.O.C. v. Chrysler Corp.*, 917 F.Supp. 1164, 1170-1171 (E.D. Mich. 1996). "Therefore, to prevail at summary judgment on the direct threat issue, [the defendant] must prove that [the plaintiff] is a direct threat as a matter of law." 84 F.3d at 764. Significantly, generally "whether one is a direct threat is a complicated, fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all the evidence about the nature of the risk and the potential harm". *Rizzo, supra* at 764.

Here, Defendant did not present any evidence regarding the issue of direct threat except the specifics of Plaintiff's vision acuity and the specifications of the DOT regulations regarding vision acuity. Instead of a factual examination of

Plaintiff's particular condition Defendant relied upon case law from other federal circuits to argue that since Plaintiff's vision acuity did not meet the DOT specifications in 49 C.F.R. § 391.41(b)(10), Plaintiff was therefore a direct safety risk. The district court erred in adopting that reasoning.

The case law relied upon by Defendant and the district court is readily distinguishable. In *Buck v. United States Department of Transportation*, 56 F.3d 1406 (D.C. Cir. 1995) the court held that the Rehabilitation Act did not require the FHWA to allow individual truck drivers who failed to meet DOT hearing requirements to try and meet the standard when there is no way in which an individual with a certain condition could meet the standard. 56 F.3d at 1408. The court reasoned: "Once an individual has admitted that he does not meet such a necessary - as opposed to a merely convenient - standard, the Rehabilitation Act does not forbid the application to him of a general rule." *Id.* (emphasis added). The clear distinction between *Buck* and the present case is that here there is an exception, that is the waiver program, created by the agency to its general rule. There are basically two vision standards, not just one, in the present case: (1) the vision acuity specifications set forth in 49 C.F.R. § 391.41(b)(10); and, (2) the provisions of the vision waiver program.⁴ 57 Fed. Reg. 31458, 31460 (1992). (See Appellant's Addendum at 3.) Thus, here the standards of the general rule established in 49 C.F.R. § 391.41(b)(10) cannot be followed to the exclusion of the standards established in the waiver program. Since

⁴The standards for participation in the vision waiver program were that applicants: held a valid state commercial license; had three years' recent experience driving a commercial vehicle without moving violation citations, license suspension, or driving-related convictions; and presented proof from an optometrist or ophthalmologist certifying the applicant met certain vision requirements and that the applicant is "able to perform the driving tasks required to operate a commercial motor vehicle." 57 Fed. Reg. at 31460.

Plaintiff fell within the exception to the general rule it was and is inappropriate to universally apply the general rule as a matter of law.

Likewise, in *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991), *cert. denied*, 503 U.S. 959 (1992), the court allowed the Department of Transportation to rely upon its general rule in 49 C.F.R. § 391.41(b)(8) prohibiting anyone with a medical history or clinical diagnosis of epilepsy from driving a commercial vehicle in interstate commerce. The court ruled that the DOT's denial of the plaintiff's request to waive the requirement did not violate the Rehabilitation Act. But, as in *Buck*, in *Ward* there was no established waiver program. Thus, *Ward* is as unpersuasive as *Buck*.

Finally, *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) is also unpersuasive. The Fifth Circuit held that "as a matter of law, a driver with insulin dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. § 391.41 presents a genuine substantial risk that he could injure himself or others." 2 F.3d 1385 (footnote omitted). However, there are several reasons that holding is not applicable to the present case. First, the holding as to vision impairment is *dicta* for the court found the vision impaired plaintiff failed to establish he was physically disabled or regarded as disabled. 2 F.3d at 1390-1393. Second, the reasoning in *Chandler* relied heavily upon the then historical fact that the standards for diabetes and vision had not been altered since 1970 despite petitions for reconsideration of the provisions set forth in 49 C.F.R. § 391.41. 2 F.3d at 1394-95. Whereas, in the present case, the provisions of 49 C.F.R. 391.41(b)(10) have been reconsidered by the agency and exceptions created for a limited time through the vision waiver program. In addition, in essence the vision waiver program provided the "case by case" determination the *Chandler* court hoped would soon be possible. 2 F.3d at 1395 fn. 52. As one district court stated: "the *Chandler* holding has been undermined by the fact that the FHWA has recently instituted

a waiver program" *Sarsycki v. United Parcel Service*, 862 F.Supp. 336, 341 (W.D. Okl. 1994). Given the FHWA's retention of the program on remand from the *Advocates* court, the finding in *Sarsycki, supra*, is still valid despite the ruling in *Advocates, supra*.

The vision waiver program created by the Department of Transportation may be a reasonable accommodation for some individuals. The trial court erred when it held that no reasonable accommodation is possible as a matter of law.

**B. Defendant Was Required To Consider
Reassignment As A Reasonable Accommodation
And Failed To Offer A Reasonable
Accommodation.**

Under the ADA, reassignment to a desired vacant position may be required as a reasonable accommodation where the employee becomes disabled while employed. *Leslie, supra*, 916 F.Supp. at 887 ("Where other forms of accommodation are not reasonable but reassignment would be reasonable under all the circumstances, the plain language of the ADA may require reassignment even if the employer does not have a regular policy or practice of permitting non-disabled employees to transfer."); 42 U.S.C. § 12111. In its Brief, Defendant argues the offer of the yard hostler position and that of tire man met its duty of reasonable accommodation if one existed. As Plaintiff demonstrated in his Opening Brief no reasonable accommodation was attempted in lieu of accepting the DOT vision waiver. Opening Brief at 19-22. The essential problem with Defendant's position is that there is a question of fact as to whether Plaintiff turned down the yard hostler position (*see* Plaintiff Affidavit at ER 19, stating he "never turned down the yard hostler position"). Likewise, there is a question of fact as to whether the tire man position qualified as a reasonable accommodation since to be a reasonable accommodation a reassignment needs to be "to an equivalent

position in terms of pay, status, etc.” 29 C.F.R. § 1630(2)(o).

There is a genuine issue of fact as to whether Defendant attempted any reasonable accommodation by means of reassignment.

III. The Trial Court Erred When It Held No Individual Assessment Of Plaintiff's Ability To Drive Was Necessary.

The trial court held that Defendant could rely upon the DOT vision standards, meaning the acuity standards in 49 C.F.R. § 391.41(b)(10), and need not make an individual assessment of Plaintiff's ability to drive. Opinion, p. 8, at ER 219, citing *Buck, supra*, and *Ward, supra*. As demonstrated above both *Buck* and *Ward* are not on point given the presence of the DOT vision waiver program. Neither case supports allowing Defendant to rely upon the provisions of 49 C.F.R. § 391.41(b)(10) to avoid a personal assessment of Plaintiff's abilities because at the time DOT regulations provided for an alternative set of vision and performance standards as established in the vision waiver program. 57 Fed. Reg. 31458 (1992).

“The determination that an individual poses a ‘direct threat’ must be based on an individualized assessment of the individual's ability to perform safely the essential functions of the job.” *E.E.O.C. v. Chrysler Corp., supra*, 917 F.Supp. at 1170, citing 29 C.F.R. § 1630.2(r) (regarding diabetic working in an assembly plant); *accord, Rizzo, supra* at 763-764 (regarding hearing impaired bus driver); *Sarsycki v. United Parcel Service, supra*, 862 F.Supp. at 341; *see E.E.O.C. v. Texas Bus Lines*, 923 F. Supp. 865, 980 (S.D. Tex. 1996) (“An employer cannot assert a direct threat defense unless it makes a showing of a reasonable probability of substantial harm.”)(case involving obese bus driver). Here, it is undisputed that such an individual assessment was not made. Instead, Defendant argues that the district court correctly

relied upon *Chandler* to hold that an individual assessment was not necessary since as a matter of law all individuals that did not meet the standards of 49 U.S.C. § 391.41(b)(10) are a substantial risk to others. Def.'s Brief at 35-36. The court's reliance on *Chandler*, as well as *Buck, supra* and *Ward, supra*, to negate the need of an individual assessment was wrong. *Sarsycki, supra*.

The case of *E.E.O.C. v. Texas Bus Lines, supra*, is instructive. In *Texas Bus Lines* the defendant required the plaintiff to be certified under the DOT regulations at issue in the present case, 49 C.F.R. § 391. After a physical examination the examining physician disqualified the plaintiff concluding she was morbidly obese. 923 F.Supp. at 967. After examining the provisions of 49 C.F.R. § 391.41, the court found the regulations did not mandate individuals be disqualified due to excessive weight and therefore the defendant improperly relied upon the physician's opinion. *Id.* at 973. The court went on to reject the defendant's argument that based upon *Chandler, supra*, it's refusal to hire the plaintiff was not prohibited by the ADA because the plaintiff was unable to obtain DOT certification. Significantly, in rejecting the *Chandler* based defense the court in *Texas Bus Lines* noted that in *Chandler* and its progeny the disqualifying condition was disqualifying *per se* under FHWA regulations, whereas in the case before it there was no equivalent *per se* disqualification for an obese individual. As in *Texas Bus Lines*, here given the existence of the DOT established vision waiver program at the time of Plaintiff's termination, the vision standards provided in 49 C.F.R. § 391.41 did not constitute a *per se* disqualification.⁵ As Plaintiff was told,

⁵As the Department of Transportation stated in reference to drivers who did not meet the vision standards in 49 C.F.R. § 391.41(b)(10): “Because they did not meet existing vision standards, these drivers could not be allowed to operate in interstate commerce, unless they obtained waivers” 59 Fed. Reg. 50887, 50889

after he failed to pass the physical examination for DOT certification, he needed a "vision waiver." CR 27 at 40. Since the acuity provisions at the time did not constitute a *per se* disqualification the district court erred in relying upon *Chandler* where the court found the same acuity provisions did constitute a *per se* disqualification.

The better analysis is presented in *Sarsycki v. United Parcel Service, supra*, 862 F.Supp. 336. As in *Sarsycki*, which found *Chandler* to be distinguishable, here the proper analysis is whether Plaintiff presents a direct threat to himself or others. As a matter of law that determination requires an individual assessment "if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices." *Sarsycki*, at 341; *Bombrys v. City of Toledo*, 849 F.Supp. 1210, 1219 (N.D. Ohio 1993); see the discussion in Plaintiff's Opening Brief at 22-25. Here, it is undisputed no individual assessment was made.

Defendant's attempt to negate *Sarsycki* relies on the holding in *Advocates for Highway v. Federal Highway Safety, supra*, 28 F.3d 1288. The flaw in Defendant's argument, and the district court's acceptance of it, is that the court in *Advocates* did not find the vision waiver program was inherently unsafe or flawed. Rather, the court merely found the FHWA did not have the statutorily required empirical evidence in the record to support its statutorily required determination that the waiver program would not adversely effect the safe operation of commercial vehicles. In essence, the waiver program was vacated on a procedural technicality. 28 F.3d at 1294. To rely upon that holding to negate the existence of the program is an error. This is especially true given the agency's subsequent affirmation of the program.

The lower court erred in following *Chandler, supra*, and

(1994)(emphasis added). Thus, while the waiver program existed, the then current vision standards did not constitute a *per se* disqualification.

rejecting *Sarsycki, supra*. An individual assessment of Plaintiff's abilities is required under the ADA, given the then existing waiver program.

IV. The Trial Court Erred In Holding Defendant Did Not Have A Combined Statutory Duty To Use Reasonable Accommodation To Facilitate Plaintiff's Return To Work As An Injured Worker.

Defendant argues that Plaintiff raises the issue of reasonable accommodation to facilitate Plaintiff's return as an injured worker for the first time on appeal. Defendant is simply wrong.

The issue was raised in Plaintiff's Amended Complaint. Amended Complaint, ¶ 8, 9(c). In the Amended Complaint it is alleged Plaintiff "sustained a compensable injury" and that "Defendant failed and refused to reasonably accommodate Plaintiff by reassigning Plaintiff to other suitable work." "Compensable injury" and "suitable work" are terms of art found in Oregon's statutory requirement of reinstatement of injured workers. See ORS 659.415; ORS 659.420.

Plaintiff specifically raised the issue of reasonable accommodation tied to reassignment to a "suitable" position, which he was entitled to as an injured worker, in his Response To Defendant's Motion For Summary Judgment. See CR 26, at 18-19. In that Memorandum Plaintiff expressly stated: "In the present case, there is an additional reason why Defendant had an affirmative duty to offer a suitable reassignment and make reasonable accommodations in that new position. Here Plaintiff was an injured worker. As an injured worker, once Plaintiff was released to work he was entitled to his old job or a suitable alternative if his old job was not available. ORS 659.415; ORS 659.420." *Id.* at 18 (factual citations omitted).

Furthermore, this dual statutory obligation was the basis for Plaintiff's motion for reconsideration. CR 50 at ER 221.

Defendant is categorically wrong when it argues this issue

was not previously raised.

Under ORS 659.415 Plaintiff had reinstatement rights to his former position and if that "former position is not available, the worker shall be reinstated in any other existing position which is vacant and suitable." ORS 659.415(1).⁶ The reference in the state statute to not being disabled in context refers to the nature of the injured worker's medical release. Compare ORS 659.415 to ORS 659.420. If an injured worker is fully released to work he is not disabled from performing the duties of the position and ORS 659.415 applies. That is the situation in the present case. In contrast, if a worker does not receive a full or complete medical release to return to work the injured worker is disabled for purposes of the statute and ORS 659.420 applies. In either situation, if the employer has no suitable jobs vacant at the time of the injured worker's demand to return to work, the employer's obligation to reinstate the worker continues until the employer offers the injured worker the next suitable job that becomes vacant or the worker's reinstatement rights terminate. OAR 839-06-130(3) and (5)(a), OAR 839-06-135(4)(a).

This continuing obligation of the employer to reinstate the injured worker to an alternative suitable position is significant since the district court denied Plaintiff's motion for

⁶ORS 659.415(1) provides: "A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. A worker's former position is "available" even if that position has been filled by a replacement while the injured worker was absent. If the former position is not available, the worker shall be reinstated in any other existing position which is vacant and suitable. A certificate by the attending physician that the physician approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties."

reconsideration largely on the ground that there was no evidence the yard hostler position was vacant when Plaintiff was terminated. CR 53, Order, p. 2 at ER 224. Using the proper analysis under the injured worker reinstatement statute Defendant's obligation to reinstate Plaintiff to suitable work continued until it did so or until his rights terminated. Under the statute Plaintiff's reinstatement rights did not terminate until three years after the date of injury, in the absence of other factors. ORS 659.415(3)(a)(F). Thus, as an injured worker Plaintiff had ongoing rights to reassignment to any other suitable position and as a disabled individual he had rights to reasonable accommodation in that other suitable position. Defendant was required under state law to return Plaintiff to other suitable employment, but because of its violation of federal law in failing to reasonably accommodate Plaintiff, that return was never effected.

CONCLUSION

For the foregoing reasons and the reasons presented in Plaintiff's Opening Brief, this Court should reverse the district court's grant of Defendant's motion for summary judgment and remand this action for trial.

DATED this 12th day of November, 1996.

Respectfully submitted,

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(Certificate of Service omitted in printing)

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HALLIE KIRKINGBURG,	)	No. 96-35002
)	
<i>Plaintiff-Appellant,</i>	)	D.C. No.
	)	CV-95-549-PA
v.)	
	)	ORDER AND
ALBERTSONS, INC.,	)	AMENDED
	)	OPINION
<i>Defendant-Appellee.</i>)	

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted
July 8, 1997--Portland, Oregon

Filed May 11, 1998
Amended July 1, 1998

Before: Alfred T. Goodwin, Stephen Reinhardt, and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Rymer

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals reversed a judgment of the district court. The court held that under the Americans with Disabilities Act (ADA), a private employer may not impose Department of Transportation (DOT) visual acuity regulations on a truck driver who has received a waiver of the vision requirements from the Federal Highway Administration (FHWA).

Appellant Hallie Kirkingburg was a commercial truck driver with almost 20 years experience and an impeccable driving record. In 1990, appellee Albertson's, Inc. hired Kirkingburg as a driver. A physician certified that his vision met the requirements of DOT regulations. Kirkingburg performed well on a 16-mile road test, and earned an evaluation of "superior driving skill" from an Albertson's transportation manager.

Kirkingburg had poor visual acuity (20/200) in his left eye, and was deemed monocular, due to an uncorrectable condition. His left-eye acuity rating was below DOT general regulations, but the rating of his right eye was 20/20 with corrective lenses.

After Kirkingburg was on the job for over a year, he suffered a non-driving injury and did not return to work for almost a year. When he returned, Kirkingburg had to

be recertified. This time, the examining physician determined that his left-eye acuity was 20/200 and refused to certify him.

Kirkingburg applied for a waiver of the DOT vision requirements under the FHWA's vision waiver program, which was instituted to bring DOT standards into compliance with the ADA. To obtain the waiver, Kirkingburg had to show that he was a commercial driver, could drive well despite his monocular vision, and had a good driving record. Kirkingburg informed Albertson's that he had applied for the waiver. Albertson's fired him on the ground that all its drivers had to meet or exceed DOT standards.

Kirkingburg obtained the FHWA waiver, but Albertson's refused to reconsider his discharge.

Kirkingburg sued Albertson's under the ADA. Albertson's contended that he was not entitled to relief under the ADA because he was not "disabled" within the meaning of the statute, and if he was, he was not "otherwise qualified" for the position of truck driver. With respect to its job-related requirements, Albertson's asserted that federal law mandated that its drivers meet the regular DOT vision requirements, that it had the right to adopt the regular DOT standards as its own, and that its refusal to accept FHWA waivers was justified because drivers who do not meet the basic standards pose a direct threat to safety.

The district court granted summary judgment for Albertson's, concluding that Kirkingburg failed to

establish a prima facie case under the ADA. Kirkingburg appealed.

[1] To survive a motion for summary judgment, Kirkingburg had to demonstrate a genuine issue of material fact regarding whether he was a disabled person within the meaning of the ADA; whether he was otherwise qualified for the position, that is, whether he was able to perform the essential functions of his job, with or without reasonable accommodation; and whether the employer terminated him because of his disability.

[2] The ADA states that a "disability" is a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment. Under implementing regulations, an impairment is substantially limiting if it significantly restricts as to the condition, *manner*, or duration under which an individual can perform a particular major life activity, as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity. Major life activities include seeing.

[3] Kirkingburg presented uncontroverted evidence that he suffered from a condition resulting in his being almost totally blind in his left eye. There was no question that Kirkingburg was substantially limited in the major life activity of seeing. Although his body compensated for his disability, the *manner* in which he saw differed significantly from the *manner* in which most people see. Kirkingburg saw using only one eye; most people see

using two. Under the statute and implementing regulations, Kirkingburg was therefore disabled, if the facts were as he alleged.

[4] Albertson's contention that Kirkingburg was not disabled because he was not totally blind was inconsistent with the expansive goals of the ADA, which was drafted in broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination.

[5] An expansive reading of the statutory definition of "disability" does not leave employers unduly exposed to liability. The ADA does not require employers to hire or retain any person who is not capable of doing his job properly. It merely prohibits employers from discriminating against qualified workers on account of their disabilities.

[6] There existed a genuine issue of material fact regarding whether Albertson's perceived Kirkingburg as disabled. Even if Kirkingburg were not disabled, his employer's perception of him as having a disability would have been sufficient to bring him under the coverage of the ADA. Because Kirkingburg presented evidence that one of the Albertson's managers described him as "blind in one eye or legally blind," he established a genuine issue as to whether his employer believed that he was disabled.

[7] Under the ADA, Kirkingburg had to show that he was a "qualified individual." In this regard, Kirkingburg had to establish that he satisfied the requisite skill,

experience, education, and other job-related requirements of the employment position that he held, and that with or without reasonable accommodation, he could perform the essential functions of his position.

[8] Kirkingburg established a genuine issue of material fact with respect to whether he could perform the essential functions of a commercial truck driver. There was no question that Kirkingburg's experience, and in particular his year of experience as a driver for Albertson's, was evidence from which a reasonable factfinder could have concluded that Kirkingburg was able to perform the essential functions of the job. More pertinent was the fact that Kirkingburg received a FHWA waiver based in part on his excellent driving record.

[9] The dispositive question was whether Albertson's job-related requirement that Kirkingburg failed to meet was lawful as applied. Albertson's maintained that Kirkingburg could not show that he was qualified because he could not fulfill its requirement of meeting or exceeding the regular DOT vision standards.

[10] Because the FHWA waiver program is part of federal law, and recognizing FHWA waivers is consistent with federal law, Albertson's could not justify its adoption of the regular DOT vision standards as a job-related requirement by asserting that federal law requires its drivers to meet those standards regardless of whether they are qualified for and obtain FHWA waivers. Albertson's did not simply conform its job requirements to the DOT regulations; it chose to adhere to only a part of the regulations, while ignoring the waiver program.

[11] By refusing to accept the FHWA waivers, Albertson's rejected a portion of the federal scheme that was designed to eliminate the discriminatory effects of DOT safety regulations and bring them into compliance with the ADA.

[12] Albertson's was not free to disregard the waiver program for the reasons it asserted at the time it fired Kirkingburg. Because there was no evidence that Albertson's believed the waiver program to be invalid, or that it relied on any such belief as a basis for its refusal to accept the FHWA waiver, it was unnecessary to decide whether such a belief would have shielded it from liability.

[13] Albertson's failed to produce any evidence that Kirkingburg and other waiver recipients posed a direct safety threat. Under the statute, a direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. A "significant risk" means a high probability of harm that is neither remote nor speculative. Drivers who qualify for the waiver program have established that they do not pose a safety threat. Denying a monocular-visioned driver the opportunity to work, in spite of his having demonstrated that he is capable of performing the job safely, is precisely the sort of discrimination that the ADA sought to abolish.

[14] The waiver program was designed to bring the DOT regulations into compliance with the requirements of the ADA, and serves to protect disabled persons against unfounded discrimination. Individuals who

secure waivers have been determined to be safe drivers. However one views the other parts of the DOT regulations, the waiver program does not provide a floor for employers; rather it precludes them from declaring that persons determined by FHWA to be capable of performing the job of commercial truck driver are incapable of performing it by virtue of their disability.

Judge Rymer dissented, taking the position that under the ADA, complying with current DOT safety requirements was an essential function of Kirkingburg's job.

COUNSEL

Scott N. Hunt, Portland, Oregon, for the plaintiff-appellant.

Corbett Gordon, Portland, Oregon, for the defendant-appellee.

ORDER

The opinion in this case is amended as follows:

At Slip op. 4623, the first full paragraph, reading "Under the ADA, an employer is prohibited", is DELETED.

OPINION

REINHARDT, Circuit Judge:

Hallie Kirkingburg, a monocular-visioned truck driver, filed an action in district court alleging that his employer, Albertson's, Inc. discriminated against him on account of his visual disability in violation of the Americans with Disabilities Act ("ADA" or "the Act"). 42 U.S.C. § 12112(a) (1994). Albertson's moved for summary judgment, arguing that Kirkingburg had not established a prima facie case under the ADA. The district court agreed with Albertson's and granted summary judgment in its favor. Kirkingburg appeals. We hold that the granting of summary judgment to Albertson's was erroneous.

The Facts

Since 1979, Hallie Kirkingburg has been driving commercial trucks. His driving record is impeccable -- he has been in only one accident, which was determined to be not his fault, and he has received no citations for moving violations. In 1990, Albertson's hired Kirkingburg as a driver at its distribution center in Portland, Oregon. Prior to starting work for Albertson's, Kirkingburg was examined by a physician who certified that his vision met the requirements established under

Department of Transportation ("DOT") regulations.¹ Kirkingburg also performed well on a 16-mile road test that Albertson's administered before it offered him the job. Following the road test, Albertson's transportation manager stated that "It is my considered opinion that [t]his driver possesses superior driving skill to operate safely the type of commercial vehicles listed above." Several months into the job, Kirkingburg was again examined by a physician and his vision was recertified.² Notwithstanding these medical certifications, the visual acuity of Kirkingburg's left eye is, and has been since birth, rated 20/200, well below what the general DOT regulations require. The poor vision in his left eye is caused by amblyopia, a condition commonly referred to as "lazy eye," which cannot be corrected. His right eye, however, has a visual acuity rating of 20/20 (with corrective lenses). In short, Kirkingburg's vision is monocular.

In late 1991, after he had been on the job for over a year, Kirkingburg suffered a nondriving, work-related

1 According to the DOT regulations, operators of commercial motor vehicles should have a "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) with or without corrective lenses." 49 C.F.R. § 391.41(b)(10).

2 Both medical examinations revealed that Kirkingburg's vision did not meet the applicable standards; neither examination, however, correctly appraised Kirkingburg's actual visual acuity. It is not clear why Kirkingburg received a certification on these two occasions in spite of his failure to meet the required standards.

injury when he fell from a truck. As a result of the accident, he did not return to work for almost a year. Albertson's policies require employees who are resuming work after a long-term absence to secure recertification under the DOT standards, and in November 1992, Kirkingburg's vision was again examined. This time, the examining physician correctly determined that the vision in Kirkingburg's left eye was 20/200. Accordingly, the doctor refused to certify him under the DOT regulations and informed Albertson's of these findings.

When Kirkingburg was denied DOT certification, he applied for a waiver of the regular vision requirements under the Federal Highway Administration's ("FHWA") vision waiver program, which was instituted in order to bring DOT's standards into compliance with the ADA without sacrificing highway safety. The establishment of this program fulfilled Congress's expectation that DOT would revise its safety regulations in order to end unfounded discrimination against drivers with visual disabilities. *See generally Rauenhorst v. United States Dep't of Transp., Fed. Highway Admin.*, 95 F.3d 715 (8th Cir. 1996) (detailing the history of the FHWA vision waiver program). Under the program, FHWA makes vision waivers available to certain experienced commercial truck drivers who have clean driving records.

In order to obtain a vision waiver under the FHWA program, the applicant, among other things, is required to establish that he has three years of recent experience driving a commercial vehicle without (1) license suspension or revocation, (2) involvement in a reportable accident in which the applicant received a citation for a

moving violation, and (3) more than two convictions for any other moving violation in a commercial vehicle. 57 Fed. Reg. 31,458 (1992). In addition, the applicant is required to present proof from an optometrist certifying that his visual deficiency has not worsened since his last examination, that the vision in one eye at least is correctable to 20/40, and that he is "able to perform the driving tasks required to operate a commercial motor vehicle." *Id.* at 31,460. In other words, DOT will waive its regular vision requirements for commercial vehicle drivers, such as Kirkingburg, who have monocular vision, are able to drive well despite that disability, and have good driving records.

Kirkingburg informed Albertson's that he had applied for a waiver under the program, but Albertson's explained that it would not accept a waiver because it had a policy of employing only drivers who "meet or exceed the minimum DOT standards." Consequently, Albertson's fired Kirkingburg from his position as a truck driver. Several months later, when Kirkingburg informed Albertson's that he had in fact obtained a vision waiver, Albertson's once again refused to accept it and declined to reconsider his termination. Kirkingburg brought suit, alleging that Albertson's discriminated against him in violation of the ADA.

DISCUSSION

The Americans with Disabilities Act

When Congress enacted the Americans with Disabilities Act in 1990, it sought to eliminate the barriers

that prevent disabled individuals from becoming fully participating members in all aspects of their communities, particularly in the area of employment. In furtherance of Congress's expansively stated goal of equality, the Act prohibits covered employers from engaging in employment practices that discriminate against individuals with disabilities. Specifically, the ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). The ADA contemplates that a person with a disability will be evaluated on the basis of his individual capabilities, not on the basis of society's biases or an employer's preconceptions.

[1] In this case, Kirkingburg claims that his employer violated the ADA by firing him because of his visual disability. In order to survive a motion for summary judgment, Kirkingburg must demonstrate a genuine issue of material fact regarding: (1) whether he is a disabled person within the meaning of the ADA; (2) whether he is otherwise qualified for the position, that is, whether he is able to perform the essential functions of the job, with or without reasonable accommodation; and (3) whether the employer terminated him because of his disability. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996). Albertson's contends that Kirkingburg is not entitled to relief under the ADA because he is neither disabled nor an otherwise qualified individual. We examine whether Albertson's has established that it is

entitled to summary judgment with respect to these two elements of Kirkingburg's ADA claim.³

1. Disabled

Albertson's first contends that Kirkingburg failed to raise a genuine issue of fact regarding whether he is disabled within the meaning of the ADA. We disagree with Albertson's argument that anything short of "legal blindness" in both eyes is insufficient to establish a disability under the ADA -- it is clear that a person who is blind or practically blind in one eye is disabled within the meaning of the Act.

[2] In determining what constitutes a disability under the ADA, we are guided by the definition of the term in the statute, which states that a "disability" is:

(A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The implementing regulations further clarify the statutory definition of a disability. Under the regulations, an impairment is substantially

³ There is no dispute regarding the third element of Kirkingburg's ADA claim; if he is disabled, he was terminated because of the disability.

limiting if it "significantly restricts as to the condition, *manner* or duration under which an individual can perform a particular major life activity as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (1993) (emphasis added). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, *seeing*, hearing, speaking, breathing, learning, and working." *Id.* at § 1630.2(j) (emphasis added). In addition, the regulations enumerate the following factors that should be considered in determining whether an individual is substantially limited in a major life activity: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* at § 1630.(j)(2).

[3] Kirkingburg has presented uncontroverted evidence showing that he suffers from amblyopia, a condition resulting in his being almost totally blind in his left eye. In short, he has monocular vision. Given the nature of the condition and its permanence, there is no question that Kirkingburg is substantially limited in the major life activity of seeing. Kirkingburg's inability to see out of one eye affects his peripheral vision and his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see. To put it in its simplest terms, Kirkingburg sees using

only one eye; most people see using two. Accordingly, under the statute and implementing regulations, if the facts are as Kirkingburg alleges, he is disabled.

The Eighth Circuit recently decided an almost identical question. In *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998), that court held that a monocular-visioned person, who could see out of only one eye because of glaucoma, was "disabled." That the individual had learned to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects did not change his disabled status. *Id.* at 627-28. It was enough to warrant a finding of disability, the court held, that the plaintiff could see out of only one eye: the *manner* in which he performed the major life activity of seeing was different.⁴ *Id.* at 627.

[4] Albertson's contention that Kirkingburg is not disabled because he is not totally blind is plainly

4 Recently, the Fifth Circuit held as a matter of law that a monocular-visioned individual was not disabled because he was "able to perform normal daily activities." *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997). We think this reasoning is inconsistent not only with the regulations, but with the Act itself. Whether an individual is disabled within the meaning of the Act does not depend, contrary to the Fifth Circuit's suggestion, on whether the individual can go about his daily business in spite of the impairment. Instead, the appropriate inquiry in cases such as this is whether, as a result of a physical impairment, the individual is required to perform a major life activity in a different manner from other persons. Notably, the *Still* court did not cite or discuss 29 C.F.R. § 1630.2(j)(1)(ii) in reaching its decision. Accordingly, we agree with the Eighth Circuit's analysis and reject the Fifth Circuit's.

inconsistent with the expansive goals of the ADA. The Act was drafted in broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination -- it was not drafted narrowly to protect only those with the most severe disabilities. *See Arnold v. United Parcel Svc., Inc.*, 1998 WL 63505, at *7 (1st Cir., Feb. 20, 1998) ("Conceptually, it seems more consistent with Congress's broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination.").

[5] We also note that an expansive reading of the statutory definition of a "disability" does not leave employers unduly exposed to liability. The ADA does not require employers to hire or retain in service any person who is not capable of doing his job properly. It merely prohibits employers from discriminating against qualified workers on account of their disabilities. The Act contains several provisions that adequately protect the employer's interests. For example, an individual seeking the protection of the Act must demonstrate that he is "qualified" for the job in spite of his impairment. 42 U.S.C. §§ 12111(8), 12112(a). And, if accommodations are necessary to enable the employee to perform the essential functions of the job, an employer will only be required to make such accommodations if they are "reasonable," in light of the costs or other burdens they impose on the employer. *Id.* at § 12111(9), (10).

[6] As an alternative ground for our decision, we note that there exists a genuine issue of fact regarding whether

Albertson's perceived Kirkingburg as disabled. Thus, even if Kirkingburg were not disabled, his employer's perception of him as having a disability would be sufficient to bring him under the coverage of the Act. 42 U.S.C. § 12102(2)(c). Because Kirkingburg has presented evidence showing that one of Albertson's managers described him as "blind in one eye or legally blind," he has established a genuine issue as to whether his employer believed he was disabled.

2. Qualified

[7] Under the ADA, Kirkingburg must show not only that he suffers from a disability, but also that he is a "qualified individual." *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990). In this regard, Kirkingburg must establish (1) that he "satisfies the requisite skill, experience, education and other job-related requirements of the employment position [he] holds," and (2) that with or without reasonable accommodation, he can perform the essential functions of the position. 29 C.F.R. § 1630.2(m); *see also Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 807-09 (5th Cir. 1997) (elaborating on the proper inquiry). We address the two requirements, beginning with the latter.

a. Essential Functions

[8] Kirkingburg has, at the least, established a genuine issue of material fact with respect to whether he can perform the essential functions of a commercial truck driver. The regulations define the term "essential functions" to mean: "the fundamental job duties of the

employment position." 29 C.F.R. § 1630.2(n). There is no question that Kirkingburg's experience as a commercial truck driver, and in particular his year of experience as a truck driver for Albertson's, is evidence from which a reasonable factfinder could conclude that Kirkingburg is able to perform the essential functions of the job. More pertinent to the issues in this case, as we will discuss more fully below, is the fact that Kirkingburg received a FHWA waiver based in part on his excellent driving record.

Albertson's maintains that an "essential function" of the job is Kirkingburg's ability to meet DOT safety regulations and that because he cannot meet the standards, he is unable to perform an essential function. We think this argument is more properly considered as a challenge to whether Kirkingburg has satisfied the job-related requirements. Accordingly, we turn to that issue.

b. Job-related Requirements

[9] In one sense, the question in this case is the traditional one -- whether Kirkingburg satisfies the first prong of the "otherwise qualified" test, that is, whether he can satisfy the pertinent job-related requirements. Ultimately, however, the dispositive question is actually whether Albertson's job-related requirement that Kirkingburg fails to meet is lawful as applied. Albertson's maintains that Kirkingburg cannot show that he is qualified because he cannot fulfill its requirement of meeting or exceeding the regular DOT vision standards. In this respect, Albertson's makes two separate arguments. First, it contends that federal law mandates

that it require that its drivers meet the regular DOT vision standards.⁵ Second, it asserts that, independent of its obligation to ensure compliance with federal law, it has the right to adopt the regular DOT vision standards as its own, and that its refusal to accept FHWA waivers is justified because drivers who do not meet the basic standards pose a direct safety threat. In turn, Kirkingburg challenges the legality of Albertson's requirements and its refusal to recognize his FHWA waiver.

(i) Compliance with Federal Law

[10] As to Albertson's first contention, we think the answer is obvious. Because the FHWA waiver program is part of federal law and recognizing FHWA waivers is

⁵ Albertson's invokes *Buck v. United States Dep't of Transp.*, 56 F.3d 1406 (D.C. Cir. 1995), for the proposition that it should not be compelled to employ a driver who cannot satisfy the regular federal safety standards. In *Buck*, three deaf truck drivers argued that under the Rehabilitation Act (after which the ADA is modeled), "it [was] unlawful for the agency to rely upon a general rule applicable to all hearing-impaired individuals without regard to their actual ability to drive a truck safely." *Id.* at 1408. The D.C. Circuit rejected the petitioners' argument, finding that the implementation of general safety standards by the FHWA and the agency's refusal to establish a waiver program is not violative of the Rehabilitation Act if insufficient evidence exists justifying such waivers. *Id.*

Buck is clearly inapposite to this case. Here, the FHWA has created a waiver program for vision-impaired drivers. The decision to implement the program was well supported by empirical evidence that a number of drivers who do not meet the otherwise applicable vision standards are nevertheless able to operate commercial vehicles safely. Moreover, the FHWA has determined that Kirkingburg is one of them.

perfectly consistent with federal law, Albertson's cannot justify its adoption of the regular DOT vision standards as a job-related requirement by asserting that federal law requires its drivers to meet those standards regardless of whether they are qualified for and obtain FHWA waivers. Albertson's has not simply conformed its job requirements to the relevant DOT regulations; rather, it has chosen to adhere to only a part of the regulations, while ignoring the waiver program.

[11] By refusing to accept FHWA waivers, Albertson's has rejected a portion of the federal scheme that was specifically designed to eliminate the discriminatory effects of the DOT safety regulations and bring those regulations into compliance with the ADA. *See Rauenhorst v. United States Dep't of Transp., Fed. Highway Admin.*, 95 F.3d 715, 716-17 (8th Cir. 1996). The waiver program was the result of Congress's expectation that DOT would review its regulations in light of the ADA's mandates and "make the necessary changes to its regulations in order to end unwarranted discrimination against the disabled." *Id.* at 717 (footnote omitted). Allowing Albertson's to prevail in this argument would deal a serious blow to the FHWA's efforts to establish regulations that conform to the requirements of the ADA, in particular the Act's mandate that disabled persons be evaluated in light of their individual abilities.

Apparently hoping to convince us that the waiver program is not a legitimate part of the federal regulatory scheme, Albertson's contends further that it should not be compelled to accept a DOT waiver because: (1) the

waiver program is experimental, and (2) it has been invalidated by the D.C. Circuit. *See Advocates for Highway & Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994). Neither of these arguments is meritorious.

The waiver program, which was instituted in July 1992, has been adjudged a success by the FHWA. *See* 59 Fed. Reg. 59,389 (1994) (determining, after two years of study, "that the issuance of waivers to the 2,399 drivers remaining in the study group is consistent with the public interest and the safe operation of commercial motor vehicles"). The success of the program is no surprise, given that waiver recipients are selected on the basis of individual evaluations, under exacting standards. Only drivers who have exemplary driving records are eligible. Contrary to what Albertson's would have us believe, there is no evidence whatsoever that drivers who have been certified to drive under the waiver program are less safe than drivers who have been certified under the ordinary standards. In fact, quite the opposite appears to be true. In an interim report, the FHWA concluded that "the driving performance of individuals participating in the vision waiver program is better than the driving performance of all commercial vehicle drivers collectively."⁶ *FHWA Interim Monitoring Report on the*

6 In fact, the excellent safety records of the waiver program participants was cause for reevaluating the program's research methods with respect to its ultimate purpose: to alter the regular vision standards permanently. 59 Fed. Reg. 59386, 59388-90 (1994). To the extent that the program was a "failed experiment," as Albertson's alleges, it was not a failure in terms of the safety performance of those to whom

Drivers of Commercial Motor Vehicles, 3 (1994).

Albertson's also contends that it was not required to accept the FHWA waiver because the D.C. Circuit invalidated the program in 1994. We do not think Albertson's can justify its termination of Kirkingburg and its refusal to accept the waiver on the basis of events that occurred long after its decisions.⁷ See *O'Day v.*

waivers were granted. Its only "flaw" was that preselecting monocular drivers with extraordinary safety records resulted in what may have been unrepresentative and super-safe group of drivers.

Detractors of the program successfully argued to the agency that because only the safest drivers were granted waivers, the safety records of waiver recipients were not reliable indicators of the potential safety records of all monocular-visioned drivers. *Id.* at 59389. Thus, the detractors concluded, the success of the waiver program should not serve as a basis for modifying the regular vision standards so as to render *all* monocular persons qualified to drive commercial trucks. The FHWA agreed and concluded that it needed to adopt a new research method "to develop parameters for performance-based visual standards" that "reflect the actual physical requirements that foster [] safe operation of commercial vehicles." *Id.* at 59389-90. But the agency's decision to change its research methods is of no help to Albertson's in this case, because the decision was based on the highly *successful* track records of the carefully selected group of waiver recipients, including Kirkingburg.

7 In some respects, this question is analogous to that presented in after-acquired evidence cases in which an employer subsequently discovers a lawful justification for its previously unlawful action. See *O'Day*, 79 F.3d at 758. The general rule in those cases is that the employer cannot use such justifications to support the discharge. However, while it is appropriate in those cases to permit the employer to use the evidence in order to limit the amount of damages it must pay, the after-acquired evidence in this case probably would not affect Kirkingburg's damage award, because the new justification does not

McDonnell Douglas Helicopter Co., 79 F.3d 756, 759-61 (explaining that evidence of a justification not known to the employer at the time of discharge cannot serve to justify the termination). Additionally, there is nothing in the record before us that suggests that Albertson's decision in November 1992 not to accept the waiver was based on its belief that the program had been invalidly adopted. Instead, on the record before us, it is undisputed that when Albertson's terminated Kirkingburg and refused to accept the waiver, it was *not* because it believed that the program had been invalidly adopted. Rather, the record reflects that Albertson's refused to accept the waiver simply because it believed that it could continue to require its drivers to meet the regular DOT vision standards notwithstanding the lawful issuance of a waiver by the FHWA. In a letter to the Oregon Bureau of Labor & Industries, dated August 23, 1993, Albertson's stated: "Albertson's does not employ drivers who do not meet minimum DOT requirements. The fact that Mr. Kirkingburg applied for and received a waiver of the DOT vision requirements, does not mean that he meets the minimum qualifications of a DOT driver."

[12] As we discussed above, Albertson's was not free to disregard the waiver program for the reasons it asserted at the time it fired Kirkingburg. Because there is no evidence in the record indicating that Albertson's believed the waiver program to be invalid when it terminated Kirkingburg or that it relied upon any such

involve employee wrongdoing and the FHWA revalidated the waiver program following the D.C. Circuit's decision.

belief as a basis for its refusal to accept the FHWA waiver, we need not decide whether such a belief would shield it from liability, or whether it might instead have been required to challenge the validity of the waiver program in an administrative proceeding. We leave these questions to the district court should they become relevant on remand. We emphasize that because we are reviewing a summary judgment motion, we do not finally resolve any issues that may be dependent on the introduction of further admissible evidence at trial.

In any event, the D.C. Circuit invalidated the waiver program in 1994 not because it was inconsistent with public safety, but because the FHWA instituted the program without complying adequately with administrative procedures. *See Advocates*, 28 F.3d at 1294. When the case was remanded to the FHWA for further consideration after the court's decision, the agency conducted the appropriate notice and comment procedures and once again concluded that the waiver program was a desirable measure in light of both safety concerns and the goals of the ADA. No challenge has been made to that decision, and the statutory provision allowing the FHWA to grant waivers to vision-impaired drivers remains in effect. 49 U.S.C. § 31136(e)(1). In fact, last year, the FHWA granted at least one waiver to a monocular-visioned driver. 62 Fed. Reg. 35,881 (1997). Thus, we reject Albertson's argument that the waiver program is not a lawful and legitimate part of the DOT

regulatory scheme.⁸

(ii) Direct Safety Threat

Alternatively, Albertson's maintains that its independent adoption of the regular DOT vision standards without the waiver provision, as a job-related requirement, is consistent with the ADA. It asserts that requiring compliance with the regular DOT vision standards is necessary to prevent visually-impaired employees from "pos[ing] a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). In other words, it argues that recognizing the FHWA waivers would constitute a direct safety hazard.

The practical effect of Albertson's argument is to seek to have us declare the waiver program invalid. We seriously question our jurisdiction to do so in the context of these proceedings. We doubt that a business that operates in the highly regulated commercial transportation industry is free to challenge generally applicable FHWA regulations in private litigation. In particular, our concern is that allowing such a challenge would effectively permit a regulated entity to circumvent the specific scheme for judicial review of FHWA regulations that Congress carefully established in the Administrative Orders Review Act (commonly known as

⁸ The dissent asserts that the waiver program is not part of the regulatory scheme. That is not correct. The statute governing the DOT safety standards specifically includes a provision allowing for waivers of the regular standards and we consider the "scheme" to include all the relevant rules, regulations, and statutory provisions.

the Hobbs Act).⁹ 28 U.S.C. §§ 2321, 2342. Because the parties have not addressed this question, however, we will not decide it here, leaving it to the district court to do so initially, should further proceedings following remand make such a determination appropriate or necessary.

[13] In any event, Albertson's has simply failed to produce any evidence that Kirkingburg and other waiver recipients pose a direct safety threat. Under the statute, a direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* at § 12111(3). A "significant risk" means a high probability of harm that is neither remote nor speculative. 29 C.F.R. § 1630.2(j). Drivers who qualify for the waiver program have necessarily established to the satisfaction of the agency charged with ensuring highway safety that they do not pose a safety threat at all.¹⁰ Denying a monocular-

⁹ The Hobbs Act governs judicial review of rules, regulations, and final orders of a handful of agencies, including the Interstate Commerce Commission, under which authority the FHWA acts. For a discussion of the Hobbs Act and its purposes, see *Carpenter v. Department of Transportation*, 13 F.3d 313 (9th Cir. 1994). *Carpenter*, a pre-waiver program case, involved a driver with monocular vision who had been disqualified from driving when the FHWA found that he did not meet the applicable vision standards. The driver brought an action in federal district court, claiming that the regulations violated his civil rights. We dismissed the claim, finding that the Hobbs Act "requires that such a challenge be brought only in the court of appeals." *Id.* at 314.

¹⁰ It bears mentioning once again that, prior to offering Kirkingburg a job, Albertson's gave him a 16-mile road test. He performed well on the test and demonstrated to Albertson's transportation manager that he had "superior driving skill to operate safely the type of

visioned driver the opportunity to work, in spite of his having demonstrated that he is capable of performing the job safely, is precisely the sort of unwarranted discrimination that the ADA sought to abolish.

[14] To the extent that Albertson's contends that DOT vision requirements governing the qualifications of truck drivers constitute a floor, not a ceiling, and that it is free to adopt more restrictive standards than are set forth in the regulations, it misperceives the nature and purpose of the FHWA waiver program. The waiver program was designed to bring the DOT regulations into compliance with the requirements of the ADA and serves to protect disabled persons against unfounded discrimination. More important for our purposes, however, the individuals who secure waivers under the program have been determined to be safe drivers. It is evident, therefore, that however one views the other parts of the DOT regulations, the waiver program does not provide a floor for employers; rather it precludes them from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver are incapable of performing that job by virtue of their disability.¹¹

commercial vehicles listed above." In fact, the record as a whole demonstrates clearly, and without a hint of any contrary evidence (other than the fact of his monocular vision), that Kirkingburg is eminently qualified for the job of commercial truck driver.

¹¹ Albertson's does not contend that it is entitled to adopt vision standards that are more stringent than those contained in the federal regulations, including the waiver program, because the work its drivers perform is substantially different from the work performed by other commercial truck driver. We express no view as to how such an

Albertson's may, in other respects, be able to adhere to stricter standards than those contained in federal regulations. But when the stricter standards it adopts screen out people with disabilities in contravention of a federal program designed both to protect the public safety and ensure compliance with the ADA, it will not be able to avoid the Act's strictures by showing that its standards are necessary to prevent a direct safety threat. To put it another way, the FHWA has already determined that the regular DOT vision standards, if applied across the board, would unnecessarily discriminate against visually impaired drivers in violation of the ADA. It has also determined that some visually impaired drivers who cannot meet the regular standards are nevertheless safe, competent drivers. In light of the agency's determination that waiver recipients do not pose a threat to public safety, we conclude that Albertson's is precluded from asserting that they do.

CONCLUSION

In short, we conclude that if the facts are as Kirkingburg alleges, he suffers from a disability and is therefore protected by the provisions of the ADA. We further conclude that in establishing its job-related prerequisites, Albertson's cannot selectively adopt and reject federal safety regulations when the effect of its selective adoption and rejection is to discriminate against truck drivers with disabilities. Albertson's job requirement, which screens out otherwise qualified

argument would fare in a case in which it was properly presented.

individuals with disabilities, is invalid.

Because Kirkingburg's failure to satisfy the discriminatory prerequisite served as the sole basis for the granting of summary judgment in favor of Albertson's, we reverse the district court's award and remand for further proceedings.

REVERSED and REMANDED.

RYMER, Circuit Judge, dissenting:

The majority subjects Albertson's to liability under the ADA for requiring a commercial truck driver to comply with the visual acuity regulations of the Department of Transportation as an essential function of his job rather than letting him participate in an experimental program that waived those requirements but had not been found safe. I must dissent.

Complying with current DOT safety requirements was an essential function of Kirkingburg's job at Albertson's.¹² There is no dispute that his eyesight didn't meet them. He could not be certified. But several

¹² Kirkingburg contends that the essential function of his job was being certified by DOT, not being in compliance with its regulations. However, there is no evidence that Albertson's ever accepted a waiver or defined the essential function of driving its commercial vehicles as anything less than complying with DOT visual acuity standards.

months before he lost his certification, the FHWA decided to select a group of experienced monocular drivers with clean safety records to be licensed for a three year study of the relationship between visual disorders and commercial motor vehicle safety. Kirkingburg says that he could have performed the essential functions of his job by virtue of a waiver, and that in any event, his disability should have been accommodated by allowing him a leave of absence to get one.

The problem is that DOT vision regulations were adopted for public safety. The version in effect in November 1992, when Kirkingburg failed to get certified, had been on the books since 1970. Although numerous studies had been conducted to determine whether vision requirements for monocular drivers could safely be changed, the FHWA found no sufficient basis for doing so as recently as July 16, 1992.¹³ See 57 Fed. Reg. 31458 (1992). That's why the FHWA decided to conduct a study to gather empirical data on monocular drivers, and to grant waivers on a limited basis to an experimental group. See *id.* Even so, the FHWA had not determined that the existing regulations could safely be waived albeit experimentally for monocular drivers. That is why the D.C. Circuit held that the waiver program itself was invalid; the agency had not made the required finding that a waiver was "consistent with the safe operation of commercial motor vehicles" as required by statute. *Advocates for Highway and Auto Safety v. Federal*

¹³ See *Rauenhorst v. Department of Transp.*, 95 F.3d 715 (8th Cir. 1996) (outlining history).

Highway Admin., 28 F.3d 1288, 1289 (D.C. Cir. 1994).

Neither Kirkingburg nor the majority explains why the ADA should force Albertson's to assume the risk of waiving vision requirements that the FHWA itself had not found could be safely waived. Instead, the majority says that because the FHWA determined in 1994 that the vision study was safe enough to continue, Albertson's cannot say that in 1992 its requirement of complying with the vision regulations and rejecting a waiver was justified on account of safety. But the syllogism is flawed:

1. The majority starts with the premise that the dispositive question is "whether Albertson's job-related requirement that Kirkingburg fails to meet is lawful as applied." Whatever this means in the context of the ADA (where the real question is whether the employee is a "qualified individual with a disability who, with or without accommodation, can perform the essential functions of the employment position," 42 U.S.C. § 12111(8)), it cannot be the case that requiring compliance with DOT safety regulations is unlawful. Nor can it become unlawful "as applied" when the alternative is a waiver available only to an experimental group of drivers in a study that no one had found was consistent with the safe operation of commercial motor vehicles.

2. Next, the majority asserts that Albertson's has not "simply conformed its job requirements to the relevant DOT regulations; rather, it has chosen to adhere to only a part of the regulations, while ignoring the waiver program." However, Albertson's did not pick and choose regulations: the regulations hadn't changed in November

of 1992 (and still haven't). It conformed its conduct precisely to the regulations in effect. The vision study waiver program was not part of the regulations, nor was it "a portion of the federal scheme" to prevent discrimination that Albertson's impermissibly rejected, as the majority suggests. Rather, the vision study waiver program was part of the FHWA's "efforts to review, and to eventually amend, its vision requirements through a rulemaking action." 57 Fed. Reg. 31458, 31458 (1992). As the agency explained,

the waiver program will enable the FHWA to conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the current Federal vision requirements. This study will provide the empirical data necessary to evaluate the relationships between specific visual deficiencies and the operation of CMVs. The data will permit the FHWA to properly evaluate its current vision requirement in the context of actual driver performance, and, if necessary, establish a new vision requirement which is safe, fair, and rationally related to the latest medical knowledge and highway technology.

Id. In short, the vision waiver study was not a rule or a regulation with the force of law. It was a test, and an invalid test at that (as the D.C. Circuit held), for no determination had been made that waiving the vision requirements would not adversely affect the safe operation of commercial vehicles.

3. Next, the majority says that the waiver program "has been adjudged a success by the FHWA." Whether that's so or not, the determination referred to is the FHWA's "Notice of Final Determination and change in research plan" issued November 17, 1994 -- two years after Kirkingburg lost his job. 59 Fed. Reg. 59386, 59389 (1994). But it doesn't matter what the FHWA *now* thinks about the safety of its waiver study program. Whatever it had learned as a result of two years worth of the experiment wasn't known to Albertson's in November 1992, or to the agency at the time of the study was begun in July 1992. As Kirkingburg seeks damages for his November 1992 termination, not reinstatement, the 1994, post-*Advocates* determination is simply irrelevant.

4. Finally, having said that Albertson's adhered to only part of the regulations because it ignored the waiver program, and that the waiver program is a success, the majority concludes that the waiver program "is a lawful and legitimate part of the DOT regulatory scheme" which Albertson's cannot say was not safe. Thus it holds that Albertson's "cannot selectively adopt and reject federal safety regulations" in establishing its job-related prerequisites, and that its job requirement is invalid. But since the vision study waiver program never was (and still isn't) a part of the regulations: and since it wasn't a success at the time of Kirkingburg's termination because it hadn't gotten off the ground and wasn't determined to be safe; and since it never was (and still isn't) a part of any regulatory scheme, there is no basis for holding that Albertson's job requirement is invalid. Nor is there any authority for estopping Albertson's, which is a private employer with legal responsibility to the public for the

safety of its commercial motor vehicle drivers, from asserting that it wasn't required to accept a waiver, or that it wasn't reasonable for it to decline to do so, on the grounds of safety. To me it is dispositive that at the time of Kirkingburg's termination (and in this record), no one (including the FHWA) had determined that a waiver was safe.

For these reasons, I agree with the district court that Kirkingburg failed to show that he could perform the essential functions of his job because he did not meet the DOT visual requirements, and that the ADA does not require Albertson's to accept an experimental waiver that the FHWA had not found consistent with the safe operation of commercial motor vehicles. Since Albertson's offered to accommodate Kirkingburg's disability by another job (which Kirkingburg rejected), it fulfilled its ADA obligations. I would, therefore, affirm.

(Caption omitted in printing)

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

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I. INTRODUCTION AND STATEMENT OF COUNSEL

Albertsons, Inc. ("Albertsons"), appellee in Hallie Kirkingburg v. Albertson's, Inc., No. 96-35002, seeks rehearing en banc of the May 11, 1998 2-1 split decision (Reinhardt, S., Goodwin, A.) (Rymer, P -- Dissent) concerning an issue of national significance under Department of Transportation ("DOT") regulations, 49 C.F.R § 391.41(b)(10), and the American with Disabilities Act ("ADA"), 42 U.S.C § 12112(a)(1994). The majority held that (1) Appellant, Hallie Kirkingburg ("Kirkingburg"), was "disabled" within the definition of the ADA; (2) Kirkingburg has raised a genuine issue of material fact with respect to whether he is a "qualified individual" under the ADA; (3) Albertsons had a duty to accept vision waivers issued under the Federal Highway Administration's ("FHWA") program; and (4) Albertsons failed to demonstrate that waiver recipients pose a direct safety threat.

Albertsons respectfully seeks rehearing en banc of all issues above. In the judgment of Albertsons' counsel, rehearing en banc is required because the Opinion of the Majority overlooked long-standing, well-established Federal Regulations in favor of an experimental program that was not an official part of Federal law, and relied on facts that were not a part of the record below. Additionally, the Opinion involves principles of law that currently have resulted in split-circuit decisions. The issues raised herein are of exceptional importance. The Majority's Opinion, if allowed to stand, will affect the health and safety of the general public. Further, the Majority's Opinion contravenes the vision requirements of the Federal Regulations that have been unchanged since 1970. See, 49 CFR §391.41(b)(10).

II. PETITION FOR REHEARING EN BANC

A. The Majority's Opinion Nullifies the Vision Requirements of the DOT.

1. Contrary to the Majority's Opinion, an employer has no duty to accept vision waivers issued under the FHWA's program.

The Majority held that Albertsons had a duty to accept Kirkingburg's FHWA vision waiver, stating that Albertsons "has chosen to adhere to only a part of the [DOT] regulations, while ignoring the waiver program." Slip op. at 4618. The Majority further stated that Albertsons "cannot selectively adopt and reject federal safety regulations." Slip op. at 4626.

The majority confuses the issue. The vision waiver program was not a part of the regulations in 1992, when Albertsons made the decision to adhere to the regulations, nor has it ever been a part of the regulations. To the contrary, "[t]he vision study waiver program was a part of the FHWA's 'efforts to review, and eventually amend its vision requirements through a rulemaking action.'" Slip op. at 4628, citing, 57 Fed. Reg. 31,458 (1992). The agency, itself, defined the vision waiver program as a "study" to provide it with necessary "empirical data." *Id.* It was not an official rule or regulation, it was solely an experiment. Significantly, this experiment has never been found to be successful enough to warrant amending the actual regulations. The Majority's holding that the FHWA vision waiver program is a part of the DOT Regulations is in error, and this should be revisited en banc.

2. The Majority's Opinion is contrary to the intent of long-established Federal Regulations.

The vision requirements in effect in November 1992

(when Kirkingburg was examined by the physician who informed Albertsons that Kirkingburg did not meet the minimum standards) had been unchanged since 1970 (and are, at the present time, still unchanged).

The minimum vision requirements established by DOT for operators of commercial motor vehicles require:

"distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses ***." 49 C.F.R §391.41(b)(10).

Forcing Albertsons to accept Kirkingburg's vision waiver would be contradictory to the long-established, and only official, DOT vision requirements. As stated above, the regulations containing these requirements have never been changed.

B. The Majority Relies on Facts That Are Not in the Record and on Case Law Which Has Only Split-Circuit Endorsement, to Establish That Kirkingburg Is "Disabled."

1. The facts relied on by the Majority are not in the record.

The Majority held that Kirkingburg has presented a genuine issue of material fact regarding whether or not he was "disabled" under the meaning of the ADA, relying, on part, on information that was not in the record. The ADA provides coverage for a "qualified individual with a disability." 42 U.S.C § 12112(a) (1994). The ADA defines "disability" as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of

such individual;

(B) a record of such an impairment;

(C) or being regarded as having such an impairment.

42 U.S.C. § 12102(2). (emphasis added). The Majority looked to the implementing regulations to assist in defining "disability" and appeared to rely heavily on the language that states (in relevant part) that "an impairment is substantially limiting if it 'significantly restricts as to the ... *manner* ... under which an individual can perform a major life activity ... as compared to the ... *manner* under which the average person in the general population can perform that same major life activity.'" Slip op. at 4613, citing, 29 C.F.R. § 1630.2(j)(1)(ii) (1993).¹

The Majority, after stating that "Kirkingburg is substantially limited in the major life activity of seeing," goes on to explain that Kirkingburg's "brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner*, in which he sees differs significantly from the *manner* in which most people see." Slip op. at 4614 (emphasis original). However, significantly, this information, upon which the Majority relies for the determination that Kirkingburg is "disabled," is simply not in the record. Thus, Albertsons urges an en banc rehearing to determine whether Kirkingburg is "disabled" under the ADA, relying only on the record before it.

2. The Majority relies on a principle of law which currently involves split-circuit decisions.

¹ This Court is bound by statutes, not regulations, this Court has recognized in the past that regulations provide guidance, but are not binding.

In determining that Kirkingburg's monocular vision was a "disability" under the ADA, the Majority relied on an Eighth Circuit opinion, Doane v. City of Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997). Doane held that a monocular-visioned person was "disabled" because "the *manner* in which he performed the major life activity of seeing was different." Slip op. at 4615, citing, Doane at 627. However, The Majority, in a footnote, cited to a Fifth Circuit decision that directly contradicted the Doane case by holding "as a matter of law, that a monocular-visioned individual was not disabled because he was 'able to perform normal daily activities.'" Slip op. at 4615 (emphasis added), fn. 4, citing, Still v. Freeport-McMoran, Inc., 120 F.3d 50, 52 (5th Cir. 1997). Until the Majority's Opinion in the instant case, the Ninth Circuit had not decided this issue. As this issue has resulted in split-circuit decisions, it must be evaluated carefully and not relegated to a mere footnote. This issue, alone, deserves en banc rehearing.

C. The Majority's Finding that Albertsons' Policy of Requiring its Drivers to Meet the Minimum DOT Vision Standards is Unlawful "as Applied" is Fatally Flawed.

1. Meeting the minimum requirements of the DOT Regulations is an essential function of Albertsons' drivers of its commercial vehicles.

In order for employees to enjoy the protection of the ADA, they must not only demonstrate that they meet the definition of "disabled" but must also establish that they are "qualified individuals" under the statute. See, Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990). The factors considered in determining whether an individual is "qualified" are: 1) whether a person satisfies the requisite skill, experience, education and other job-related requirements of the employment position, and 2) whether with or without

reasonable accommodation the individual can perform the essential functions of the position. See, 29 C.F.R. § 1630.2(m).

The Majority held that Kirkingburg had established a genuine issue of material fact with respect to his status as a "qualified" individual. Although Albertsons contended that Kirkingburg failed to meet the "essential function" prong of the "qualified individual" test by the fact that he did not meet the minimum requirements of the DOT, the Majority addressed this issue under the "job-related requirement." Albertsons respectfully asserts that the proper analysis would be under both prongs.

"Essential functions" are defined by the regulations as "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n). In order to work as a commercial driver for Albertsons, an individual must meet or exceed the standards set out in the DOT Regulations. Albertsons does not allow drivers to drive its commercial vehicles without meeting or exceeding the standards set out in the DOT Regulations. Kirkingburg did not meet the minimum DOT standards, thus he could not drive commercial vehicles for Albertsons. Driving is a "fundamental job duty" of Albertsons' position of commercial truck driver. Contrary to the Majority's holding, because he did not meet the DOT minimum standards, Kirkingburg could not perform the essential function of a commercial truck driver for Albertsons.

Second, the Majority did not ultimately address whether Kirkingburg met the "job-related requirement." Rather, the Majority attacked the legality of Albertsons' enforcement of the job-related requirement that commercial vehicle drivers meet the minimum standards of the DOT Safety Regulations "as applied." Slip op. at 4617. The Majority, again, relies on its misplaced understanding of the FHWA's vision waiver program and that program's relationship with the Federal Regulations. As stated above (Section A, 1., 2.), the waiver program of the FHWA was never a part of the Federal

Regulations, rather it was an experimental program. A rehearing en banc is strongly suggested to resolve the relationship between the waiver program and Federal Regulations.

Additionally, the Majority disputes Albertsons' argument that it was concerned with the safety of the vision waiver program. The Majority does not provide any support for its assertion that Albertsons' decision not to accept vision-waivers was not based on safety. The only support cited by the Majority is a 1994 FHWA Notice, 59 Fed. Reg. 59,386, 59,389, which announced that the waiver program "has been adjudged a success by the FHWA." Slip op. at 4619. Thus, the Majority relies on a Notice that was issued two years after Mr. Kirkingburg left the employment of Albertsons. It is clearly not a Notice of which Albertsons would have been aware in deciding the safety issues involved in accepting a vision waiver (Although, that decision never had to be made, as Kirkingburg did not have a valid waiver at the time of his termination.).² Again, because the Majority relied on facts outside the record and because the safety at issue here involves not only the safety of the drivers, but also the safety of the general public, Albertsons urges rehearing en banc.

² Significantly, Kirkingburg did not have a vision-waiver at the time of his termination. See, Appellant's Opening Brief, 5-6, 10. He did not receive a vision-waiver until 3 months after his termination. See, Id. Therefore, even if the Court follows the Majority's reasoning that Albertsons had to apply both the DOT Regulations and the FHWA's vision-waiver, and not pick and choose which to follow, Kirkingburg still would not escape his termination. At the time of his termination, Kirkingburg had not satisfied either the DOT vision requirements contained in the Federal Regulations, or the requirements of the FHWA vision waiver. The facts at issue here are inconsistent with the result reached by the Majority's Opinion.

III. CONCLUSION

For the foregoing reasons, Albertsons respectfully requests rehearing of all issues presented above, and/or rehearing en banc, as appropriate, for reasons set out in the statement of counsel, above.

DATED this 23rd day of May, 1998.

CORBETT GORDON & ASSOCIATES, P.C.

s/ Heidi Guettler

Corbett Gordon, OSB No. 82009

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Albertsons, Inc.

(Certificate of Service omitted in printing)

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HALLIE KIRKINGBURG,	)	No. 96-35002
)	
Plaintiff-Appellant,	)	D.C. No.95-549-PA
v.)	
	)	ORDER
ALBERTSON'S, INC.,	)	Filed July 8, 1998
)	
Defendant-Appellee.)	
)	

Before: GOODWIN, REINHARDT, and RYMER,
Circuit Judges.

Judges Goodwin and Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Rymer voted to grant the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

EXCERPTS FROM DEPOSITIONS

DEPOSITION OF DAVID MICHAEL COOPER

DIRECT EXAMINATION

* * *

By Mr. Busse:

[79ER] Q. Where do you work?

A. Albertson's distribution center.

Q. What do you do there?

A. I'm currently transportation superintendent.

Q. And who do you report to?

A. Ted Sturgill.

Q. Who reports to you directly?

A. Who reports to me directly?

Q. Right, right.

A. I oversee the dispatch office, so --

Q. Have you had any dispatching positions open there in the last couple of years?

A. I would say yes.

Q. You know Hallie was terminated in November of '92. When was the next dispatching position, to your recollection, that came available after that?

A. Gosh, sometime in '93, I would guess.

Q. How many dispatchers do you have?

A. Four. And one -- and one safety, so actually -- he's a dispatcher, also.

Q. Okay, so we've got five. Is it one per shift? Or how do you cover it?

A. One per shift.

* * *

[80ER] Q. You mean Hallie.

A. Right.

Q. If he would have wanted it, would you have given him a good recommendation?

A. I would have to know about his background.

Q. Do you hire people that have no dispatching background, per se, I mean, who are drivers?

A. I'm not involved in the hiring of dispatchers at all.

Q. I understand. But from your knowledge, do you have some dispatchers that have never dispatched before; they've driven before?

A. I had never dispatched before, so --

Q. Were you ever a dispatcher?

A. No. I was a driver, before I came into dispatch.

Q. What was your first job in dispatch?

A. A dispatcher.

Q. Okay. For how long were you a dispatcher?

A. Four years, five years.

Q. And then your next job was?

A. Superintendent.

* * *

DEPOSITION OF ROY DWIGGINS

DIRECT EXAMINATION

* * *

By Ms. Gordon:

[88SER] Q. And in connection with his union grievance, did Albertson's make any offers of alternate jobs to Mr. Kirkingburg other than over-the-road driving?

A. Yes.

Q. Do you remember that they made an offer of a yard hostler job?

A. Yeah, they did.

Q. And do you remember that they made an offer of a tire man job?

A. Yes.

Q. Were you the person who was in contact with Mr. Kirkingburg about those offers?

[89SER] A. Yes, I was.

Q. And did Mr. Kirkingburg refuse both of those jobs?

MR. BUSSE: Objection, leading.

Q. Did you offer him each of those jobs?

A. I remember distinctly offering him the tire job, and I know I have a letter from the company offering him the yard job.

Q. Do you remember whether he accepted or rejected those positions?

MR. BUSSE: Objection, compound.

Q. Can you answer that question?

A. I remember that he didn't take the tire job, and I don't really know for sure if we got into the hostler job a whole lot at that time.

Q. Do you remember telling him that the company had offered him the yard hostler job?

A. Yes.

Q. And do you remember him telling you anything about whether he did or did not want that job?

A. The only thing -- I looked through my file. The only thing I can recollect is, within a couple of days after receiving that, we asked for arbitration on the issue. I don't recall a specific

DEPOSITION OF HALLIE KIRKINGBURG

DIRECT EXAMINATION

By Ms. Gordon:

[26ER] Q. Now, do you remember being offered a job to work in the mechanic shop?

A. No, I don't remember being offered any job in the mechanic shop.

Q. Do you remember the union telling you about one or two positions that were available, Roy Dwiggins or somebody from the union talking to you about that?

A. I remember something about a yard -- deliver tractors in the yard and moving trailers.

[27ER] Q. Is that a yard hostler job?

A. I'm not sure that's the right terminology.

Q. And is that a job you wanted?

A. I gradually accepted. I thought I had it.

Q. Did you understand why you didn't get that job?

A. I was never informed of any reason.

Q. After that do you remember being offered a job that had to do with going into the mechanic shop?

A. I was never offered a job, that I know of, in a mechanic shop.

Q. What about being a tire man in the shop?

A. There was that kind of an offer made to me.

Q. So when you say no job was offered, I wasn't offered any work, that's not absolutely correct, is it?

MR. BUSSE: Objection, argumentative. You can answer.

THE WITNESS: Was that a question?

MR. BUSSE: Yes.

THE WITNESS: I didn't understand it then.

* * *

[28ER] Q. Okay. How old are you?

* * *

[28ER] A. 57.

Q. What's your date of birth?

A. May 21.

Q. What year?

A. Oh, '38.

Q. May 21, 1938?

A. Correct.

[29ER] Q. And outside of the Air Force have you had any formal education, classroom education?

A. Yes.

Q. What was that?

A. I went to Cerritos College.

Q. Can you spell that?

A. No.

Q. Cerritos College?

A. (Nodding head).

Q. Where is Cerritos College?

A. Norwalk, California.

Q. Did you graduate from Cerritos College?

A. Yes.

Q. With what degree?

A. The one that says A's, AA or something.

Q. Associate of Arts?

A. Yeah.

Q. Okay. What year?

A. Well, I got the diploma in '79.

* * *

[30ER] Q. In the Air Force what kind of training would you receive?

A. Jet aircraft mechanic.

Q. Anything else?

A. Not that I can think of.

Q. When you took the mechanic training when you worked for Los Angeles County and you took automotive classes from different dealerships, was that basically automobile mechanics?

A. And trucks.

* * *

[35ER] Q. All right. And then is it your testimony that you didn't have another workers' comp injuries until you came to work at Albertson's?

A. That's right.

Q. What was your next workers' comp injury?

A. I think something fell on my back at one time.

* * *

[36ER] A. I was hurt in '91.

Q. Okay. What happened in '91?

A. I don't know what happened. I hurt my head, I know that.

* * *

[36ER] Q. And the injury at Albertson's where something fell on your back?

A. Sometime in '90.

Q. The Albertson's injury where you were lifting a dolly and hurt your shoulder?

A. Seems to me like it was in '92 but -- 1990, I mean.

Q. 1990 also, okay. And the injury where you were in

Washington and slipped on some ice and hit your head on a dolly, do you remember the year for that?

A. No. It was after '90, but I don't remember.

Q. It was after '90 and before this 1991 injury; is that right?

A. Yes.

[37ER] Q. Now, let's talk about the injury in 1991. You say you don't remember what happened. What's your understanding of what happened?

A. I fell from a truck.

Q. Do you know what caused you to fall?

A. No.

Q. And is it your understanding that you injured your head in that fall; is that correct?

A. That's correct.

Q. Was that accepted as a workers' comp injury?

A. I don't know.

Q. Did you get your doctor bills paid?

A. Most of them.

Q. Okay. Was it just your head that was injured in this 1991 injury or were there any other parts of your body that were injured as well?

A. I know my hand and my shoulder hurt.

Q. And are you aware of the workers' comp carrier accepting parts of that as a workers' comp injury and not another part? In other words, were some of your body parts covered and others not, in your understanding?

A. My understanding is I don't know all about it.

[2SER] A. No. Same thing, I believe 20/20. Well, you said left, but I don't know. My left eye doesn't change with the glasses.

[38ER]Q. When did you begin wearing glasses?

A. Must be when I was 12 or 13 years old.

[38ER]Q. Did this eye condition keep you from any particular assignments when you were in the Air Force that you're aware of?

A. No.

Q. Other than your experience at Albertson's, has your eye situation ever interfered with your doing anything else in terms of work that you wanted to do?

A. Not that I recall.

Q. Have you avoided doing any types of work because of your eye condition?

A. Not that I recall.

Q. And are you aware of anything that you have

[39ER] Q. And insofar as there are factual statements in here, do you believe those to be true?

A. I'm not clear on what you mean by factual statements.

Q. Okay. Let's start, for instance, with Statement of Claims, Claim One, ADA, paragraph 6 on page 2. There's a factual statement here that says "Plaintiff" - that's with reference to you - "was employed by defendant" - that's with reference to Albertson's - "as a truck driver until November 20, 1992 when he was terminated." Do you believe that to be a true statement?

A. The best I can recall.

Q. When were you first employed by Albertson's?

A. Sometime in '90.

Q. And it's your understanding you were terminated November 20, 1992; is that correct?

A. Yes.

[40ER] Q. By whom?

A. The transportation manager he called himself.

Q. Do you remember his name?

A. I think it was Sturgess or Sturgill.

Q. Ted Sturgill?

A. Ted Sturgill.

Q. At the time that you were terminated by Ted Sturgill, did Mr. Sturgill give you any reason?

A. His reason was, "We're not going to accept the waiver."

Q. Did you have a waiver at that time?

A. No.

* * *

[41ER] right name is. That my vision had not changed and wasn't likely to change.

Q. Do you remember when you heard back from the DOT about your waiver application?

A. It was in February of '93.

Q. And at the time that the waiver -- I take it you were granted a waiver; is that right?

A. It took a long -- longer than necessary to get the waiver, yes, but I did get the waiver.

Q. When did you actually get the waiver?

A. The end of February 1993.

Q. When you got that waiver what, if anything, did you do with it?

A. I took it, I believe I took it over to the transportation people, or maybe called them. I don't know which one.

Q. You don't have a specific recollection?

A. Maybe both. Maybe I sent it, maybe I took it over. I don't know.

Q. Do you remember with whom you spoke, whether it was in person or on the telephone?

A. No, I don't.

Q. Do you remember what the person told you, whoever it was?

A. No.

* * *

[42ER] Q. What's the first job you are aware of that came open after November 20, 1992 that did not require DOT vision certification?

A. That's an awful long question. I can't remember what you said.

Q. Okay. At some point after November 20, 1992 did you become aware of an opening at Albertson's, a nondriving opening?

A. I believe the first one was this trailer -- trailer moving.

Q. Okay. Did somebody offer you the trailer moving job?

A. I believe the union man called me and told me to call Albertson's, they had that opening.

Q. Did you call Albertson's?

A. Yes.

Q. Who did you talk to?

A. I believe I was told to call somebody by the name of Frank.

Q. Is that Frank Riddle?

A. He's a -- he's, I believe, in charge of that center.

Q. Okay. Frank Riddle, the general manager?

[43ER] A. I'm not sure what his title is, but he was the one I was told to get a hold of.

Q. And did you get a hold of Frank?

A. Yes.

Q. And what do you recall of that conversation?

A. He actually didn't know anything about it. He told me he has to catch up on it.

Q. Catch up on the opening or catch up on you or catch up on what?

A. He wasn't aware of the opening or aware of what was going on, more than likely.

Q. Did Frank catch up on whatever and call you back?

A. He says, "I'll have Ted call you back."

Q. Did Ted call you back?

A. Correct.

Q. And that's Ted Sturgill?

A. Yes.

Q. Do you remember that conversation?

A. I don't remember the conversation, other than I believe I was supposed to go over to the center.

Q. To the Portland Distribution Center?

A. Correct.

Q. Did you go over to the center?

[44ER] A. Yes.

Q. What did you do when you got there?

A. I was told to be there at eight, whatever day it was. I'm not sure what day it was. And I remember they kept me waiting for a long, long time, like an hour or more.

Q. Do you remember who you were supposed to meet with?

A. Ted.

Q. Anybody else?

A. Not that I know of.

Q. Okay. Did you finally meet with Ted after waiting for over an hour?

A. Yes.

Q. In his office?

A. Yes.

Q. Anybody else present?

A. No.

Q. What do you remember of that conversation?

A. I know he was very rude to me.

Q. What do you remember of the conversation?

A. He asked me about -- if I had a DOT card.

Q. Uh-huh (affirmative response). Did you?

A. Yes.

Q. So was this after you had gotten your waiver?

[45ER] A. Yes.

Q. Okay. Then what? Did you show him the card?

A. Yes.

Q. Then what happened?

A. He asked me who that doctor was.

Q. And this is the doctor from the Tillamook Vision Center?

A. No. That's the Dr. Sayler that had given me the physical in October of 1992.

Q. So you had a physical before you were terminated?

A. I had a physical before I was released to go to work by Albertson's doctors.

Q. Okay. What else do you remember of the conversation?

A. He gave me some papers to read.

Q. What were they?

A. How to hook up trailers.

Q. What else happened?

A. And then he sent me back to the lunchroom to read the papers.

Q. Then what happened?

A. A man, I believe his name is Dave, that is now -- when I was driving he was a dispatcher. Now [46ER] I believe he is promoted.

Q. Is that Dave Cooper?

A. I'm not sure of his last name. I'm only pretty sure of his first name.

Q. Oh, okay. A man named Dave did what?

A. He came to the lunchroom and got me; we went back to the office.

Q. Then what happened?

A. As near as I recall, he said "Ted said take these home and read them. We'll be calling you," and I can remember being about as happy as I could be.

- Q. So did you take them and go home?
A. Yes.
Q. And then what happened?
A. I went home and they never called me.
Q. Do you know why?
A. No.
Q. Do you know if you need to have DOT certification to do the trailer job?
A. No.
Q. Are you aware of whether Albertson's needs to take a waiver, a vision waiver?
A. I'm not -- I don't understand your question.
Q. Do you know whether as an employer who employs over-the-road truck drivers or people who

- [4SER] Q. What's the next contact you had with someone from Albertson's?
A. I believe personnel called me about a tire re -- repairing tires.
Q. Do you remember when that was?
A. No. After the trailer moving.
Q. After you'd gone in and talked to Ted and Dave about the trailer moving job?
A. Yes.
Q. Do you know whether there had been any other jobs opened at the Portland Distribution Center at Albertson's between the trailer moving job and the tire man job?
A. Yes.
Q. What openings were those?
A. Truck driver.
Q. Anything other than the truck driver?
A. Not that I'm aware of.
Q. Were those over-the-road truck driving openings?
A. Yes. I believe the ads are the same thing that I

- answered prior to Albertson's.
Q. In other words, it was similar to the job [47ER] that you'd been doing for Albertson's?
A. That's correct.
Q. And it would require DOT certification?
A. Yes.
Q. Other than the truck driver jobs that were opened between the trailer moving job and the tire man job, are you aware of any other jobs at the Portland Distribution Center that came open during that time?
A. No.
Q. Okay. Tell me about the conversation when personnel called you about the tire repair job.
A. The best I can recall, he said there was an opening in the tire repair shop.
Q. Is this again Charlie Norris?
A. Yes.
Q. And do you remember what you responded?
A. Told him I'd never changed a truck tire in my life.
Q. You had never change a truck tire?
A. That's right.
Q. Were you interested in the job?
A. I was interested in work but I didn't feel I was qualified for that job.
Q. Did you tell Mr. Norris that?
[48ER] A. Not at that time.
Q. Why not?
A. The best I can recall the conversation was I asked him what it paid, and he said about eight or \$9 an hour. And that was, I believe, about five or six less than I'd been making an hour. I told him I didn't know anything about that. He said they would teach me, but he gave me -- he says, "We will. I'll let you call me back on the next Tuesday," I believe it was, or a Monday, and let him know.
Q. Did you call back?
A. No.

Q. Why not?

A. He called me before that, before I called back.

Q. Okay. What happened in that phone call?

A. I asked him, I said, "Charlie, would this job eventually get me back to driving truck?" And he said, "Hold on a minute," while he asked Ted. He come back on the phone and said, "No."

Q. Did you ask him why?

A. No is no.

Q. Did you ask him why?

A. No.

Q. And then at that point was there any more discussion about the tire man job, whether you wanted it or not?

A. I believe I told him under those conditions I wouldn't accept that job.

Q. Between the time that you were terminated in November of 1992 and the time that you refused the tire man job, had you been out looking for other work?

A. Yes.

Q. Had you actually worked for anybody during that period of time?

A. Yes.

Q. Who did you work for?

A. I drove for the people I used to drive for, the Pepsi people.

Q. Anybody else?

A. That's the only people I actually worked for.

Q. Now, the Pepsi people, is this from the Pepsi warehouse in Wilsonville?

A. No. This is Pestaga Trucking owns several Pepsi trucking companies in the area.

Q. Who? Can you repeat the name?

A. Pestaga.

Q. Can you spell that?

[50ER] Q. It says in the next paragraph "On December 3rd, 1991 Plaintiff sustained a compensable injury." Do you know what that means?

A. Yes.

Q. What does it mean?

A. I believe that I was hurt on the job.

Q. Okay. Is this the time that we've been talking about, you fell out of the truck in 1991?

A. Yes, I believe so.

Q. The next sentence says that "Following his release for full duty Defendant subjected him to a physical examination." Did you at some point have a release, a full release to return to work?

A. Yes.

Q. Do you remember when you got that?

A. On the 6th of November.

Q. Okay. And how did you come to have a physical examination?

[51ER] A. It was scheduled by Albertson's doctors.

Q. Okay. And somebody told you you needed to go do that?

A. Yes.

Q. Had that happened to you before when you were coming back from a workers' comp injury?

A. I'm -- I'm confused. When you said "physical examination," I thought you meant the release to go back to work.

Q. What this sentence says is "Following his release for full duty," Albertson's, the Defendant, "subjected him," that's you, "to a physical examination."

Is it your testimony then that it was before you got the full release you had the examination?

A. My testimony is, is one doctor released me to go to work unconditionally, and I took that release to Ted Sturgill and they would not accept it. They said I had to go get another physical examination.

Q. Okay. What doctor gave you the full release?

A. I'm not sure of his name, but it seemed like a color like -- I want to say Brown, but I'm

[52ER] A. Pardon?

Q. Was it the same person who'd just gotten older or is it a completely different person?

A. No, it was a brother to the first one, but a different office, and that's what puzzled me about it.

Q. Do you remember that second examination?

A. Yes.

Q. Was there anything unusual about it?

A. Yes.

Q. What was it?

A. I felt that I was being inducted in the Air Force.

Q. What do you mean?

A. Very thorough examination.

Q. Did you have a problem with that?

A. It was unusual.

Q. Unusual compared with what?

A. Any other driver physical that I had taken before for Albertson's.

Q. Did you ask Dr. Eubanks why he was being so thorough?

A. No.

Q. Did you ask anybody why he was being so thorough?

[53ER] A. No.

Q. What's your understanding of the results of that exam?

A. The results was that they said I needed a vision waiver.

Q. Dr. Eubanks told you that?

A. I don't remember if it was him or one of his nurses.

Q. Is that the first time you'd ever heard of a vision waiver?

A. Yes.

Q. Did the nurse explain or Dr. Eubanks explain why you needed a vision waiver?

A. They said something was wrong.

Q. Did you ask what?

A. Yes.

Q. What did they say?

A. Something's wrong with my vision.

Q. Did you ask for any more detail than that?

A. I said what? My vision has always been this. It has never changed. So it was hard for me to believe what they were talking about.

[54ER] Q. And then the third one says "Defendant" - that would be Albertson's - "failed and refused to reasonably accommodate Plaintiff by reassigning Plaintiff to other suitable work."

Albertson's did offer you a tire man job that would not have transfer rights; is that right?

A. Yes.

Q. And you do not consider that to be a reasonable accommodation; is that right?

A. No. I felt that being a 56-year-old man, at that particular time if I would have went in off the street and asked for that job, there was no way in hell they would have ever gave it to me, because in the paper it said the requirements of that.

Q. What were the requirements in the paper?

A. I think about three years or longer experience and something about inventory, but I don't remember all of it. But what was so ironic

[58ER] Q. Why did you leave that job with LA County?

A. I decided I wanted to drive a truck.

Q. Do you remember why you made that decision?

A. Well, I'd been driving for the county on and off, road test.

[59ER] Q. Did you have a commercial license?

A. I had to have to work there.

[59ER] Q. Do you remember why you left? You went to drive a truck you said?

[60ER] A. Yes.

Q. Did you have a specific job you were going to?

A. I think moving van lines, something.

Q. Do you remember the name of the van line company?

A. I believe it was Global.

Q. Where was that based?

A. Anaheim.

[60ER] Q. (By Ms. Gordon) How long did you work for Global?

A. Maybe nine months to a year.

[61ER] Q. Why did you leave the Global van line job?

A. To go independent.

Q. Did you have your own truck?

A. Yes.

Q. Were you using your own truck on the Global job?

A. Yes.

Q. What kind of truck was it?

A. Kenwood.

Q. When you went independent, did you have contract work with people?

A. Well, I got my own authority in California.

Q. Is that the equivalent of the PUC authority?

A. I don't know.

Q. Was your authority just for in state or did you have intrastate authority?

A. It was only for California at that time.

Q. And your authority was for one truck?

A. Yeah.

Q. Okay. How long did you work as an [62ER] independent truck driver?

A. I'm not sure. Maybe '80 or '81.

Q. Do you remember any of the companies you drove for?

A. Yes.

Q. What were they?

A. Shane, Diamond Contract, W. Anaheim. There was a lot of other ones but I can't think of their names.

Q. Do you recall how well you did financially during the years you were an independent driver?

A. No.

Q. Why did you stop running your own truck in '80 or '81?

A. I believe it was divorce.

[64ER] Q. Okay. Tell me what happened with that gas station. You came up in '81 or '82 and took it [65ER] over, and what did you do with it?

A. Put the mini mart in it and sold it because I had bid on the county contract and got that.

Q. And is this the county contract where you were hauling garbage?

A. Yes.

Q. So is this -- you still had the same truck you had had in California?

A. No. I'd sold that one because it wouldn't work for the garbage.

Q. Okay. So you sold the over-the-road truck and you got a garbage truck; is that right?

A. Well, there's six months or so between one and the other, but yes.

Q. How long did you have the county garbage contract?

A. We had it till 1989.

* * *

[66ER] Q. Okay. And what was your next job after the garbage contract, your next regular job?

A. Well, I drove some for Pastega I believe.

Q. Could you spell that?

A. I'm not sure how to spell it.

Q. Is this the Pepsi contract?

A. Yes.

Q. Okay.

A. Tillamook.

Q. Using your own truck?

A. No.

Q. Using their truck?

A. Yes.

Q. Do you remember when you started that job?

A. No.

* * *

[69ER] Q. Okay, thanks. And you don't have to apologize for putting your hand on your head. You can do whatever makes you comfortable.

Okay. So you went and worked more and more for Denny during the summer of 1990 and then what happened?

A. He went to some independent haulers that did most of the hauling then.

Q. So your hours got cut?

A. Yes.

Q. Do you have any reason to think that he was dissatisfied with your work?

A. No.

Q. Okay. What job did you do next?

A. I applied for different jobs in the paper.

Q. Did you say in the paper?

A. In the newspaper.

Q. Okay. Do you remember what you applied for?

A. Yeah. Albertson's.

Q. Okay. Anything else?

A. I can't think of other ones now. Probably Safeway, maybe, ones that haul for Thriftway.

Q. And you were hired by Albertson's; is that right?

* * *

[70ER] A. M-hm.

Q. Do you have any understanding why those two amounts are set out separately?

A. Yeah.

Q. What is that?

A. One -- the first one is what they paid me compared to what I was making when I got hurt, and the second one is, as I understand it, the medical portion that they paid out.

Q. Okay.

MR. BUSSE: Oh. Excuse me.

Q. (By Ms. Gordon) Now, interrogatory No. 12 asked you for your driving record --

A. M-hm.

Q. -- and any driving restrictions, including personal as well as commercial over-the-road driving records. And your answer is "September 16, 1990, expired registration conviction

in Tillamook Municipal Court, personal"?

A. Uh-huh.

Q. What registration was that that expired?

A. I borrowed a -- an old U-Haul van from a friend of mine to move some stuff out of a rental I had, and come to find out, it wasn't legally registered.

[71ER] Q. Oh, so you happened to get stopped while you were in your friend's vehicle?

A. Yeah.

Q. And then interrogatory No. 13 asks you for your accident history, and you -- the response is "April 28, 1991, accident in Newberg, Oregon, personal, not at fault." What happened?

A. I was driving through Newberg on the way to work only because of the slide here on the Wilson River at that time --

Q. I remember that.

A. -- and the other car was going down three lanes, and the car pulled over in front of me and forced me into the curb and the sign post.

Q. Were you injured in that accident?

A. Just I hurt my arm or shoulder, and I think it was just trying to grab whatever I had on the seat.

Q. There's -- answer to interrogatory No. 14 is your work history, and it includes a couple of things we haven't talked about yet so I want to make sure I have an understanding of your work history.

These are companies, as I understand it, for whom you actually have worked. Is that right?

A. Uh-huh.

[12SER] Q. (By Ms. Gordon) Okay. You've been given Exhibit 6, Mr. Kirkingburg. This lists your rate of pay as 13.25 as of February 9, 1992. Is that your recollection?

A. I don't -- I don't remember any of that, no.

Q. Okay. What's your best recollection of your rate of pay at the time you left Albertson's?

A. 14 something.

Q. Would that have been in 1991 or 1992?

A. I guess it would be '91, but I'm not sure.

[14SER] Q. Going on to Exhibit 9, the Employee Status Report records a termination date of 11-20-92 with a code of 418. And if you look on the back of this exhibit, 418 is checked and it says, "Other, employee failed DOT physical." Is that your [15SER] understanding of why your employment with Albertson's was terminated?

A. No, it's not.

Q. What is your understanding?

A. My -- I was only terminated after they told me they wouldn't accept the vision waiver.

Q. So this date is not correct?

A. This date -- I don't see a date on there, no. Oh, there it is. That's -- that's the day that Ted Sturgill called me at 4:30 in the afternoon.

Q. 4:30 in the afternoon Ted Sturgill called you on November 20, 1992?

A. That's right.

Q. And you had the conversation that you've already described on the record; is that right?

A. What conversation?

Q. The one that you talked about the first day of your deposition.

A. I don't remember that.

MR. BUSSE: Page 70.

MS. GORDON: You're good at this, Rich.

MR. BUSSE: Thank you.

Q. (By Ms. Gordon) "Question; at the time that you were terminated by Ted Sturgill, did Mr. Sturgill give you any reason?"

[16SER] "Answer; his reason was we're not going to accept the waiver."

A. That's right.

Q. And that happened on the 20th of November?

A. Yes.

Q. Okay. Had you then discussed a waiver with him at that time?

A. No.

Q. So do you know why he was talking to you about a waiver?

A. Well, because I applied for a waiver.

Q. Did you tell him you had applied for a waiver?

A. I don't know if I told him or not, but I know he was aware of it.

Q. Okay. I think you said before that you had talked to Charlie Norris about that.

A. I talked to Charlie right after I talked to Ted and found out he was listening on the telephone when Ted called me.

Q. Had you talked to Charlie before about the fact that you were applying for a waiver?

A. Not that I recall.

Q. Do you know how Ted Sturgill got the information that you were applying for a waiver?

[72ER] started, but I don't remember what his name was. You asked me for his address.

Q. Jeffrey Brown?

A. Brown, yeah. He released me to go to work with no restrictions at all. And they should have just put me back to work.

Q. Did Jeffrey Brown give you a DOT physical?

A. I don't know what you call it.

Q. You said you had a DOT card in your packet that said that you were okay. Is that right?

A. That's right.

Q. When was that card generated? When was the physical done for that card?

A. That was taken one week before I went to Dr. Brown.

Q. And it was after the accident?

A. Yes.

Q. Do you still have a copy of that card?

A. No. But Albertson's does.

Q. And what doctor did the physical for that card the week before?

A. I'm not sure of the doctor, but it was done at Tillamook medical where I always had all my physicals done.

Q. And as far as you know, that was a DOT [73ER] from Roy Dwiggin to Bruce Paolini dated November 30, 1992, requesting information regarding you and your reinstatement rights. Do you remember the union getting involved in this?

A. I remember -- I remember talking to this Dwigger -- Dwiggin.

Q. Okay. His letter says, "It is my understanding that Mr. Kirkingburg -" actually he wrote Kirkinburg "- has presented himself at the Portland center with a current, valid DOT card and has been refused work." Now, is that the card you were telling me about that the doctor issued about a week before Dr. Brown released you to return to work?

A. Yes.

Q. Do you have any understanding of why one doctor would find that you were fit for work under the DOT regulations and another would find that you were not?

A. You'll have to repeat that. I don't understand what you meant.

Q. Well, I'm just curious if you have any understanding how one doctor found that you were certifiable under the DOT regulations and another doctor found that you were not certifiable. Do you [74ER] know how that happened?

A. Well, there's three that I can think of. Albertson's Dr. Eubanks and the one that originally gave me the DOT, he

certified me. It was only after I got hurt that all of a sudden my vision was too bad to drive for Albertson's.

Q. So when you say there's three, you're talking about there's three different times that you were tested?

A. Three different Albertson's doctors -- no, two -- no, at least three or more plus my own doctor that gave me the clearance of the physical.

Q. And your own doctor who cleared you, do you remember who that was?

A. No, I don't remember the name, because lately - and by that, the last few years - you don't know who you're going to get when you go in for a physical.

Q. And that's the Tillamook center?

A. Yes.

[74ER] Q. (By Ms. Gordon) There's -- on Exhibit 2, page 2. He's kidding, you can go ahead and look at Exhibit 2. There's two Dr. Eubanks listed. There's [75ER] a Dr. Robert Eubanks in Troutdale and a Dr. Douglas Eubanks in Portland. Which Dr. Eubanks is it that was the Dr. Eubanks you're talking about when you say the Albertson's Dr. Eubanks?

A. The very first Dr. Eubanks I went to when they said I had to have a physical when they hired me was Dr. Bob Eubanks out in Troutdale.

Q. Okay. And then who's this other Dr. Eubanks?

[75ER] A. Well, there's actually more Dr. Eubanks. Dr. Bob Eubanks' wife also gave me physicals.

[75ER] Q. (By Ms. Gordon) So Dr. Bob Eubanks' wife

is also a Dr. Eubanks?

A. Yes.

Q. And then who is Dr. Douglas Eubanks?

A. He's the last Albertson's one that gave me a physical.

Q. So both Dr. Douglas Eubanks and Dr. Bob Eubanks are Albertson's Dr. Eubanks?

[19SER] Q. Okay. He found your vision in your left eye to be 20/200. Is that your understanding of the correct vision in your left eye?

A. Yeah.

Q. And he wrote, "Since birth." Do you know if he would have had any way of knowing that it had been that bad since birth other than your telling him that?

A. No.

Q. Did you tell him that, it had been that bad since birth?

A. I don't remember.

Q. Is it your belief that it has been that bad since birth?

A. Yeah.

[76ER] So is it your understanding, Mr. Kirkingburg, that you're driving on a waiver right now or you would be driving on a waiver or you would be driving on that card that you just took out of your pocket?

A. I'd have to have the waiver, too, when I drive, a copy of the waiver.

Q. And that will be a copy of the same thing we're looking at here which is the second two pages of Exhibit 27?

A. Yes.

Q. Okay. And you have an appropriate driver's license from Oregon?

A. Yes.

Q. And you have no suspensions or revocations on that driver's license?

A. No.

Q. And no reportable accidents in which a citation was issued to you for a moving traffic violation?

A. No.

Q. No convictions for a disqualifying offense or more than one conviction for a serious traffic violation driving a commercial vehicle?

A. No.

[77ER] Q. Do you have no more than two convictions for any other moving traffic violations while operating a commercial motor vehicle?

A. No.

Q. Okay. There are also some reporting requirements listed here on the waiver. It says, "There are six reporting requirements which must be met in full during the term of this waiver." Now, you haven't had a moving traffic violation, is that correct, since you got the waiver?

A. No.

Q. It's not correct or you haven't had one?

Have you had any moving violations since you got the waiver?

A. No, I haven't.

Q. Okay. No. 4 says, "Submit documentation of an annual examination by an ophthalmologist or optometrist at least 15 days before the annual anniversary of the effective date of the waiver." The effective date of the waiver is 2-25-93. So in February of '94 or before then did you submit documentation of an annual examination by an ophthalmologist or an optometrist?

A. Yes.

Q. And who was that optometrist or

[20SER] Q. (By Ms. Gordon) Okay. You've been given Exhibit 31. The first page of Exhibit 31 is a physical examination form which also states meets Department of Transportation requirements. It's signed by Dr. Robert Eubanks. It's dated August 18, 1990. And it reports that the vision in your left eye is 20/70. Have you seen this before?

A. No.

Q. Do you have any reason to doubt that that was your actual vision in your left eye as of August of 1990?

A. It's never been that, that I know of.

Q. Okay. And your basis for believing that is what?

A. Well, it's always been 20/200 in that eye.

Q. And you told me before that you know it hasn't changed because you've been looking out of it all these years and you can tell it hasn't changed. Did you get any medical opinion prior to August of 1990 that told you that the actual number vision acuity for your left eye was 20/200?

A. Other than the other physicals I've taken [21SER] for my other doctors.

Q. Do you remember any of those doctors?

A. The Tillamook place.

Q. So you had had vision tests at the Tillamook clinic before August of 1990?

A. Yes.

Q. And they tested the acuity in your left eye?

A. They tested whatever needed to be tested.

Q. Do you have a specific recollection that they told you that your vision in your left eye was 20/200?

A. I think there's a copy of this somewhere from there.

Q. From the Tillamook vision clinic?

A. Yes.

Q. Do you know where that copy is?

A. No.

Q. The third page of this exhibit -- the second page is some regulations, again, from the Department of Transportation. And the third page is a report signed by

Douglas Eubanks, November I think it's 6th, 1992, and this is the one I think we were looking at before that shows the vision in your left eye at 20/200.

[22SER] Going on to the next page of the exhibit, it's, again, another physical examination form, this one signed by Theresa Eubanks. It's dated 2-5-91, and shows the acuity in your left eye as 20/100. Have you seen this report before?

A. Never.

Q. Were you aware that Dr. Bob Eubanks and Dr. Theresa Eubanks had previously believed that your eye was not as bad as 20/200?

A. No.

Q. Then there is a photocopy, the last page of this exhibit is the medical examiner's certificate signed by Dr. Douglas E. Eubanks -- it says Douglas Eubanks, excuse me, dated November 6th, 1992, stating that you are qualified only when wearing corrective lenses. Is that the Dr. Eubanks who did your physical in Portland?

A. It appears to be, but I've never seen this.

Q. Okay. You've never seen this card before?

A. No. And it says I'm qualified to drive.

Q. Did you sign it? Is that your signature?

A. They always have you sign these when you apply.

Q. So it's your understanding that this card would say that you are qualified to drive?

[23SER] Q. (By Ms. Gordon) Okay. You've been given Exhibit 32. It's a letter dated May 17, 1993, to Roy Dwiggins, business representative, Teamster's local 305, from Dona Adams Pike of Albertson's offering you, through the union, employment as a yard hostler. Have you seen this letter before?

A. No.

Q. Did Roy Dwiggins tell you about this offer?

A. Yes.

Q. What the letter says is, "If Mr. Kirkingburg is interested, he should contact Mr. Frank Riddle at the Portland Distribution Center." Were you made aware of that?

A. Yes.

Q. Did you contact Mr. Riddle?

A. Yes.

Q. What happened?

A. He said he didn't know anything about it.

Q. Then what happened?

A. He said he would have Ted call me.

Q. Did Ted call you?

A. Yes.

DEPOSITION OF BEATRICE MICHEL, OD

DIRECT EXAMINATION

By Ms. Gordon:

[199ER] MS. GORDON: Mr. Hunt, I don't believe we've had any records from that clinic. If you could get a release to them right away, I'd appreciate it.

MR. HUNT: Uh-huh (affirmative response).

MS. GORDON: Thank you.

Q. (By Ms. Gordon) You say that I've only asked you, and I have, about the Snellen acuity test and the field of vision test. Was there anything else given to Mr. Kirkingburg in any of those four -- excuse me, five examinations from this clinic that you consider to be important in terms of the kinds of things that the DOT looks for?

A. Color vision, which is normal. They asked me about

that on one of the reports. He does have strabismus which is an eye turn, since childhood in the left eye. He has exotropia where the left eye turns out which is the cause for the amblyopia which is the cause of the reduced vision in his left eye. And the color test reveals the presence of exotropia. I found that to be important.

A stereopsis test was done at the request also of the DOT. Stereopsis measures the depth perception at a near distance and gives an idea of [200ER] binocular function.

Q. When you say "near distance," how near?

A. Oh, 16 inches. Stereopsis is really the ability for both eyes working together to have depth perception limited to the short distances rather than the long distances. We rely on other cues for depth at the long-range distances.

Q. What cues are those?

A. Those are monocular cues to depth. And if I may, I'd like to just specifically go right from a text that will detail that, and I can make copies of that for you, too.

Q. Is this a text that you normally rely on?

A. Yes, and this is particularly pertinent for Mr. Kirkingburg as it is related to the diagnosis of strabismus, which is the eye turn.

Q. Can you, before you refer to a section in there, read into the record the title, the author?

A. Let me see if this is the author or the editors. It is a book by Gunter Von Noorden, N O O R D E N, MD. Title is Binocular Vision and Ocular Motility Theory and Management of Strabismus, and this looks like it's the second edition.

Q. And the publisher?

A. Publisher, CV Mosby Company.

[201ER] Q. Date?

A. Date, 1980.

Q. And the section you believe is particularly pertinent begins at page?

A. Page 29 through 32.

Q. In your own words, can you tell us what that means that is significant to Mr. Kirkingburg?

A. Well, I think there's a lot of misunderstanding about two-eyed vision and what cues are needed to have proper depth perception, particularly in a case like Mr. Kirkingburg. I would assume that that would be at issue.

People, I think, assume that two eyes are needed for full depth perception when in fact there are significant monocular cues to depth that rely on the vision of one eye only to allow a person to have correct spatial orientation.

And those monocular cues, just briefly, the first is motion parallax. When you see two items, one in front of the other, and as you move your head the apparent movement of the farther object is larger than the near object, and that allows you to localize where those objects are in space.

Linear perspective is the idea where an object that has the same size as it moves away from [202ER] you appears smaller, much like railroad tracks appear to converge together off in the distance.

Overlay contours is the aspect where when two objects, one is partially blocking the other, we have learned on the monocular basis that the one that is in front of the partially blocked is the near object.

Distribution of highlights and shadows, this is particularly important because our assessment of shadows, like in sunlight, give us strong cues to depth.

Size of known objects, if you know the size of an object, you can judge how far away it is from you by its relative size.

Aerial perspective, that's the influence of the atmosphere, and these are the monocular cues to depth which are also important.

So while the stereopsis test is the test that's required and asked for by the DOT, in certain situations like distance viewing, it's not going to be a really particularly relevant or necessary skill.

Q. What, if any, test did you perform on Mr. Kirkingburg

at any point in time which would tell you what his depth perception is with these [203ER] monocular cues?

A. There is no test, to my knowledge, available to test these cues. These are learned at an early age and universal to most people, and as far as I know, there is no test to quantify these.

Q. Does your book or your own personal experience as an optometrist give you any information whether nighttime or low-light situations would influence these various conditions that you've just described?

A. Nighttime and low light definitely influence a person's vision, but whether they influence a person's monocular abilities with regard to depth is not known to me. That's not what I think of when a person tells me that they have problems with nighttime viewing.

Q. But you have described something with sunlight reflecting on something.

A. For shadows.

Q. For shadows. Obviously at night you wouldn't have those cues, would you?

A. No, but you have, of course, other cues and you also have overhead lights. For instance, if you have streetlights, it would be a similar effect. Lights coming toward you, from behind you, all these [204ER] things would relate to the same phenomenon.

Q. Are there binocular cues that function for distance depth perception?

A. Not to the degree that they do at near. The stereopsis testing and the stereopsis skill is most typically for the near distance. It has its greatest influence at near.

Q. Are there nonetheless some binocular cues that two eyed, or people with good sight in both eyes, would rely on for distance depth perception?

A. Well, I would imagine so. Again, I'm not the expert in this area per se. My understanding is that it is most influential at the near distance and its affect -- and its impact on the

distance is not something that I can quantify for you.

Q. And are you certain that the big E is the 24/100 test?

A. Yes.

Q. As opposed to a 22/100 test?

A. Yes, on my Snellen chart, that is true.

Q. Is the Tillamook Vision Center your employer?

A. Well, the professional corporation, Halperin and Michel, ODs, PC, is my employer.

Q. So you are a partner in this business?

* * *

[205ER] you've already told us about?

A. Yes. for this particular instance, for applying for the federal waiver, I relied on the federal register dated March 1992 in which we were specifically asked to comment on the visual acuity ability of this patient, as well as the Oregon DMV statutes for noncommercial vehicle use in which I work with patients oftentimes who have been asked to have me evaluate their vision in order to qualify for a conventional license.

Q. And now you're referring to the waiver program which would allow someone with a conventional noncommercial Oregon license to qualify for a waiver; is that right?

A. With the Oregon DMV, yes, that's noncommercial. But in basing my reports, I relied on the premise of that federal register for that waiver program.

Q. Is it your understanding under the federal register waiver program that one of the things that would qualify someone for a waiver would be a noncommercial regular driver's license from the State of Oregon?

A. No. In my mind it had only to do with their commercial driving record as well as their [206ER] visual acuity. With regards to requirements regarding the driving record, I did not really address that because that was not at issue for me but specifically just addressed the visual acuity

information that was needed to obtain the waiver.

Q. So you did not take into account, to any extent, whether or not Mr. Kirkingburg had a valid Oregon driver's license; is that right?

A. That is correct, because I was not asked to comment on that. What I was asked to comment on is whether or not his visual abilities were sufficient for safe driving. And given the requirements that I've seen for noncommercial use as well as the requirements for the federal register, I felt that he would be competent to drive from a visual standpoint. As to other issues, of course I cannot address that.

Q. Did you and Mr. Kirkingburg discuss the kinds of trucks and kinds of conditions in which he drives?

A. Not specifically, but I understand he was driving a commercial truck for Albertson's.

Q. Do you know where he was driving that truck?

A. I do not.

[86SER] Q. Do you know under what conditions he was driving that truck?

A. I do not.

Q. Do you know if he drove at night?

A. I do not.

Q. Do you know if he left the state of Oregon?

A. I do not.

Q. Do you know if he ever had more than one trailer?

A. I do not.

Q. You understand what it means to be under oath?

A. I do.

Q. And you know you're under oath today?

A. I do.

Q. You know that if your answers to any questions were different at another point in time, it could be used to show that you were not being truthful?

A. I do.

Q. Have my questions been clear?

A. I hope so. I think so.

Q. If I ask you a question you don't understand, will you let me know?

A. I will.

[207ER] Q. Do you have any recollection whether the FAA for pilots has a requirement that each eye needs to independently meet a certain standard as opposed to a combined reading?

A. Again, to my recollection, I believe not. I believe it has to do with two-eyed acuities. And I believe, if I'm correct, it might even have to do with what the unaided acuity is at near is more critical to them. But again, I'd have to consult my records on that.

Q. Do you have any medical opinion whether Hallie Kirkingburg at this time is safe to drive an 18-wheel truck with a trailer over state and interstate commerce?

A. On the basis of his vision, I would say that he meets the criteria that I have been asked to comment on.

Q. And those criteria are the ones in the waiver standards of DOT as opposed to the regular standards; is that right?

A. That is correct.

Q. Are you familiar with the purpose of the waiver program, federal waiver program?

A. My understanding of the purpose of the [208ER] waiver program is to conduct a study to assess whether or not the vision standards could or should be relaxed for commercial motor vehicle drivers, and that this study was being conducted over a period of years and they were selecting people to participate in the waiver program with what is considered less vision than the current requirement has compared with the control group.

Q. Do you have any medical opinion whether Hallie Kirkingburg would be a better or worse driver than someone with good binocular vision under the conditions I previously

asked you about, over the road, interstate driving with a couple of trailers?

A. Well, if that is the only basis of judgment, I would say he would be equally competent because, again, this has been a lifelong condition. He has made adaptations and adjustments which work very well for him, and I don't think that he, on the basis of vision alone, would be better or worse than someone with binocular vision.

Q. What adaptations and compensations has Mr. Kirkingburg personally made on the basis of his eye long vision -- or his lifelong vision?

A. Well, if someone is newly --

Q. Not someone. I'm asking you about your [209ER] patient, Hallie Kirkingburg, that you personally know as his physician, what adjustments or adaptations he personally has made, not what someone you imagine would have done with his vision.

A. I see. Mr. Kirkingburg, having had this condition since childhood, has not had binocular vision since childhood, and given that, has always functioned as a one-eyed person and has always relied on monocular cues.

The reason why this is sufficient, this is different for a person who is newly one eyed. For a person newly one eyed who has relied generally on two-eyed vision, much more adaptation is required because this is a new way of vision for them. They have to compensate in ways that Hallie has learned as a child.

Q. I understand the answer you're giving me, but my question to you is, are you making assumptions because Mr. Kirkingburg has been monocular since birth as opposed to having run some specific tests or made some specific observations on him that tells you that he's functioning that way today because he's been monocular since birth, or is this something that you generally believe is true?

A. I generally believe this is true.

DEPOSITION OF CHARLIE NORRIS

DIRECT EXAMINATION

By Mr. Busse:

[81ER] Q. How long were you there?

A. At Albertson's in Portland?

Q. Yes.

A. From March of '88 to June of '94.

Q. What job title?

A. Personnel Manager.

Q. Who did you report to?

A. The controller, who was Martin Teal at that point in time.

Q. The controller?

A. The controller.

Q. Martin Teal. T-i-l-l?

A. No. T-e-a-l. He was the first controller.

Q. Where was his office?

A. His office was in the distribution center, second floor.

Q. Who did he report to?

A. The general manager.

Q. Who was that, as of November '92?

A. Frank Riddle.

Q. What were your job duties, as personnel manager?

A. I was administrator of employee benefits, hiring and selection, administering Workers' Comp claims, employee morale.

Q. How about training and discrimination requirements?

[82ER] A. That was handled out of our corporate office.

Q. Was there any training by your corporate office, then, in the requirements of the Americans with Disabilities Act at the Portland distribution center prior to November of 1992?

A. I believe there was.

Q. And did you receive any training?

A. Yes.

Q. So you became acquainted with the employer's obligation to reasonably accommodate disabilities; correct?

A. That's correct.

Q. And you knew that that was a balancing of the requested accommodation against the undue hardship; right?

MS. GORDON: Object to form.

Answer, if you can.

BY MR. BUSSE:

Q. Go ahead.

A. I'm not familiar with that.

Q. In any of your training that you were given, were you told that, in determining whether or not a requested accommodation was reasonable, the employer could take into account whatever undue hardship was presented to it?

MS. GORDON: Same objection.

[83 ER] THE WITNESS: I wouldn't remember that.

BY MR. BUSSE:

Q. Pardon?

A. I wouldn't remember that.

Q. Have you ever heard the term "undue hardship" in the context of reasonable accommodation under the ADA?

A. I don't remember that.

Q. Can you tell me what undue hardship would have been caused to the company by accepting a vision waiver in Mr. Kirkingburg's case?

MS. GORDON: Object to the form, calls for speculation, no foundation.

Go ahead and answer, if you can.

THE WITNESS: No, I don't.

BY MR. BUSSE:

Q. As far as you knew at the time of his termination, was he a good driver for the company?

A. I wasn't familiar with his driving record. I wouldn't have been privy to that.

Q. Were you a part of any conversation at which the termination decision was discussed?

A. Only on the day that it happened.

Q. Tell me what you recall.

A. I recall being called to Ted Sturgill's office to witness a phone call to Hallie Kirkingburg.

[84ER] Q. And what was said in that conversation?

A. I don't remember the exact content, other than the fact that his termination with Albertson's was -- or, his employment with Albertson's was terminated as of -- and I don't know the exact date that was quoted at that point in time.

Q. Was there some reference to vision waiver in that conversation?

A. Not that I remember.

[85ER] Q. Do you recall discussing what other work could be available to the employee as an alternative to termination?

A. No.

Q. Do you recall that anyone else discussed whether there was any other work that could be made available to Mr. Kirkingburg?

A. No.

Q. After the termination decision, what next [39SER] involvement did you have in the subject of his employment or termination?

A. I made one employment offer to Hallie.

Q. How did that offer come to you?

A. The general manager said that there was a -- "a tire mechanic position available. I want you to call Hallie and

offer it to Hallie."

[41SER] Q. Do you have any recollection of the substance of the conversation that you had with Mr. Kirkingburg as to the tire mechanic position?

A. Yes.

[42SER] Q. And what do you recall was said in that conversation by you and by him, in substance?

A. I remember telling him that we had a tire mechanic position and would he be interested. And from what I remember, he said, "No, I'm not interested. I'm a truck driver, I'm not a tire mechanic."

Q. Is there anything else that you can recall in that conversation?

A. That's it.

Q. Now, we've talked extensively about your hiring process. Between the time of his termination and the time you made that offer, were there openings at that distribution center that were filled at Albertson's, to your recollection?

A. To my recollection, yes.

Q. In what positions?

A. That -- I wouldn't know exactly.

[42SER] Q. Now, Albertson's is a big employer. Is the Portland distribution center the only place of employment at Albertson's, besides the home office in Boise?

A. No, sir.

[86ER] Q. Did you have any disability discrimination training?

MS. GORDON: You're talking about at West One?

MR. BUSSE: Yes.

THE WITNESS: No, sir.

[86ER] Q. It doesn't matter. I withdraw it. Now, Exhibit 1, in the reasonable accommodation policy, it says, "The Company will afford reasonable accommodation to applicants and employees with a known disability as long as such accommodation does not cause undue hardship to the Company."

My question is, what undue hardship would have been caused to the company by reason of the acceptance of Mr. Kirkingburg's vision waiver, if you know?

MS. GORDON: Object to form.

Go ahead and answer.

THE WITNESS: I don't know.

[87ER] Here's another one. December 26th, 1992, Albertson's to transportation and/or personnel manager regarding DOT request for information. Do you recall having received that from Mr. Kirkingburg?

A. No.

Q. Have you ever seen that document before?

A. No.

Q. Do you recall anyone at Albertson's asking you to help him with his application for a vision waiver?

A. No.

Q. Do you recall taking any action to help him obtain his vision waiver?

A. No.

[88ER] A. Did I know if he had prior qualifications to perform the tire mechanic position?

Q. Yes.

A. No, sir.

Q. You were just following instructions.

A. Yes, sir.

Q. Did anybody ask you to look for work for Mr. Kirkingburg, other than having to do with the one offer of the tire mechanic slot?

A. Not that I recall.

DEPOSITION OF FRANKLIN DELANO RIDDLE

DIRECT EXAMINATION

By Mr. Busse:

[91ER] Q. What was your last position at Albertson's?

A. I was general manager of the distribution center in Portland.

Q. For how long did you hold that job title?

A. About seven years.

[92ER] Q. Can you tell me what efforts you made to reasonably accommodate Mr. Kirkingburg prior to his termination.

A. Mr. Kirkingburg was offered different positions, not by me but by -- by others.

Q. Anything else?

A. No, not from me.

Q. And I take it that, before terminating him, you expected those other persons under your supervision to have looked for those other positions. Correct?

MS. GORDON: Object to form, lack of foundation.

Answer, if you can.

THE WITNESS: Well, not exactly. The -- not before termination.

BY MR. BUSSE:

Q. Okay. To your knowledge, was there any effort to look for other work for him prior to his termination?

A. Yes.

Q. Tell me what effort there was.

[93ER] A. There were other jobs discussed, and those jobs were jobs that we felt that he was -- could be -- that would fulfill the need at the time.

Q. What jobs were discussed?

A. There was a yard hostler job, a fueling -- fueling or -- tire man job. And I don't recall, there were -- might have been others, but I don't recall what they were.

Q. Now, we're talking about prior to his termination; is that correct?

A. Well, at the time of his termination, or thereabouts.

Q. Well, that's what I'm asking you.

A. Well I don't know whether it was before or after, but it was all in the same period of time.

Q. Well, my question is pointed toward a specific period of time. Do you know of any effort that you made to find him other work prior to his termination on November 20th, 1992?

A. No.

Q. Do you know of any effort that anyone else made to reasonably accommodate him by finding him other work prior to November 20th, 1992?

A. I believe there was effort by others.

Q. What is your basis for that belief?

A. Conversations that I had with our personnel manager [94ER] at the time.

Q. And who was that?

A. Charley Norris.

Q. What did you and Mr. Norris discuss, prior to Mr. Kirkingburg's termination, about other work for him?

A. Just what I've said, the various jobs that I've mentioned.

Q. So you recall that this was before the termination that these discussions took place?

A. I don't recall that.

Q. Well, that's what I'm asking you. I want you to be careful in your testimony. I've asked you for efforts that you knew of that others undertook prior to his termination. Do you know of any such efforts?

A. No. I can't specify the date.

Q. Who made the decision to terminate my client?

A. I did.

Q. And why was he terminated?

A. The -- the review of his DOT file indicated that he was not qualified under the DOT minimum requirements.

Q. And what minimum requirements are you referring to?

A. Vision.

Q. Did you use the DOT requirements as the standard for Albertson's?

A. I'd have to qualify that by saying I believe that's [95ER] correct, but the discussion was carried on between myself and corporate offices, so I would assume that it was.

Q. When you say "corporate offices", I need a person. Who was that?

A. Dona King.

Q. And?

A. Bruce Paolini.

Q. Anyone else?

A. Scott Jardine, in all probability, would have been the other.

Q. Let's go back to my question. Do you know of any physical qualification standards that Albertson's had adopted prior to Mr. Kirkingburg, apart from the DOT standards?

A. Would you state that again.

Q. Do you know that they had their own physical qualification requirements?

A. We had physical tests, the ergonomics test that was administered, and I'm not sure if that would superseded, but we have -- basically our drivers are required to meet the DOT minimum requirements.

Q. As to vision, is there anything but the DOT requirements?

A. Not that I'm aware of.

Q. So you went by whatever the DOT established; [96ER] correct?

A. It was in the -- whatever's in the -- No. We went by the minimum requirements established in the DOT manual.

Q. Was there anything in writing that said, "We're going by the minimum requirements", to your knowledge?

A. I don't recall.

Q. Is it your understanding that the DOT's requirements, in the DOT manuals, say "minimum requirements"?

A. Yes.

Q. What if the DOT changes their minimum requirements? Would you accept those?

A. Yes.

Q. All right. What if the DOT provides that, "To accommodate persons who are disabled, we may waive certain of those requirements"? Would you accept that?

A. No.

Q. Why not?

A. The waiver has to be a two-way street. We did not accept waivers at all.

Q. But why not?

A. We felt that it was a matter of safety. We were solely concerned about the safe operation of our vehicles.

Q. If the DOT, in its regulations in adopting a waiver of the vision requirement, would narrowly confine those [97ER] waivers to certain circumstances to provide for safety, would you accept that?

MS. GORDON: Object, calls for speculation.

Answer, if you can.

BY MR. BUSSE:

Q. Go ahead.

A. I can't say what may happen now. At the time, we -- we were concerned about the minimum requirements in the DOT manual, the minimum DOT requirements. Waivers, we did not accept.

Q. Even if a person could drive safely who was eligible for that waiver?

A. We --

MS. GORDON: Object to the form of the question.

Go ahead and answer it, if you can.

BY MR. BUSSE:

Q. Go ahead.

A. We felt that safety -- the safety risks far overrode the -- the ability -- the waiver requirements. We felt that it was too great a risk to have the highway --

Q. Did you know Mr. Kirkingburg as a driver, prior to his termination?

[98ER] A. Yes.

Q. And did you know him to be a good, safe driver?

A. I had no -- Yes.

Q. Can you tell me what additional safety risk Mr. Kirkingburg presented on November 20th, 1992, that he had not presented earlier?

A. His vision, clearly, was a problem.

Q. In terms of any difference or change in safety, can you tell me what additional safety risk he presented in November of 1992 that was not presented earlier?

A. Well, when we hired him, his vision was -- met the minimum requirements. At the time that this occurred, the

DOT tests showed that he did not meet the minimum requirements. So there had been a deterioration, based upon the reports that I received.

Q. Was it your understanding that his vision in his left eye was always 20/70 or better during his employment at Albertson's?

A. No.

Q. What was your understanding --

A. It was 20/70 at the time we hired him.

Q. And?

A. And at the time this transpired, we found that -- or, it was reported to me that his vision had gone to 20/200 in that eye.

[99ER] Q. I take it that you looked at the DOT file.

A. I saw the report -- the card that the report came through on and the file that showed the -- the last test that it showed, I don't recall.

Q. Well, Mr. Sturgill said that the vision tests are kept in the DOT file. And I take it that, before passing on this man's employment, you would have reviewed the DOT file --

A. I did not look at the DOT file at the time. I was -- had a conversation with the people, and they were -- Ted Sturgill and others, and they reviewed that manual with me. I did see a card was all I saw.

Q. Before terminating him, did you go back to see if Mr. Kirkingburg could provide any further history concerning his vision and whether or not it had, indeed, deteriorated?

A. The matter was handled by others after that.

Q. What do you mean "after that"?

A. Well, Charley Norris, personnel manager, did the -- did the research and communications.

Q. You mean after you decided to terminate him?

A. Uh-huh.

Q. That's a "yes", for the court reporter?

A. Yes.

Q. Well, my question is, before making that decision,

[100ER] did anyone discuss going back to Mr. Kirkingburg to confront him with these findings to determine whether or not they were reliable?

A. I believe they did, yes.

Q. What is the basis for that belief?

A. Personnel manager would have done so, and I believe did so.

Q. And by "personnel" --

A. I had conversations with Charley related to that matter. I didn't do it, but I did have conversations with Charley on it.

Q. Tell me what conversations you had on that.

A. Concerning the fact that his eyesight had deteriorated and whether or not -- whether or not he had actually had the correct vision -- you know, had met the requirement at the time we hired him. And he had, at the time.

* * *

[101ER] Q. Okay. My question has to do with any conversations that you had with Mr. Norris or anybody else that would direct them to go back to Mr. Kirkingburg to confront him with these findings to ascertain whether or not they were reliable.

A. Yes.

Q. Okay, tell me what you know about that.

A. I discussed with Charley the need to review his file and review with him.

Q. And by "him", you're talking about Kirkingburg.

A. With Kirkingburg.

Q. And so you expected Mr. Norris to do that; right?

A. Yes.

Q. Do you have any knowledge whether or not Mr. Norris indeed did that?

A. I -- He did.

Q. Who told you that?

A. I have seen notes to that effect.

Q. What notes are you referring to?

A. Notes from Charley's -- Charley had made on

* * *

[102ER] A. Well, as I indicated, we had the tire maintenance guy's job, we had the fueler's job -- actually, had a -- mechanics and, of course, warehouse persons.

Q. Does the warehouse-type job come available from time to time?

A. Yeah.

Q. Do you recall whether or not there were any openings on that side?

A. Are any or were any?

Q. Were any.

A. I'm sure there was.

Q. Do you know that wasn't offered to Mr. Kirkingburg?

A. Well, he would have -- had he expressed an interest in it, we would have given him the opportunity. We require all of those folks to take a -- the ergonomics test. And had he applied and passed those, he would have been accepted, I'm quite sure.

Q. How about the mechanic's job? How many mechanics did you have?

A. Well, there was, I think, 12 at the most, and I don't know what there is now.

Q. What do these people do as mechanics there?

[103ER] A. They repair tractor engines, tractors, trailers, the various parts of the automotive equipment.

Q. What training are they typically given for that work?

A. Well, generally they are hired as experienced people. And those who are not are hired as an apprentice of sorts and have some experience but given -- are allowed to work on that training-type thing toward a mechanic's positions.

Q. Do you know how many of the 12 positions are the apprentice type? Or is there any set number?

A. I don't know. There was never any -- we had no set number, but I don't know what there was.

Q. So you have hired apprentices, or persons to be trained into that mechanic's position, prior to that time.

A. Well, in reality, no. We hired the fuelers and -- the fueling position, we frequently -- not frequently, but occasionally, when a opening developed in the mechanics, would provide -- if someone had some talent or interest, they would be moved into that -- into that apprenticeship training program.

Q. You mean like in a service station, a guy that's a gas jockey will then move into the garage and do the tune-ups, that sort of thing?

A. Yeah, same or similar, yeah.

[104ER] Q. How many fuelers did you have?

A. There was two when I was there. I'm not sure --

Q. Were there any fueller positions available, if you know?

A. There were occasionally. I don't know what --

Q. I take it, from your comments and your testimony, that you did not take it upon yourself to be the one to look for this other work that you could offer to him.

A. No.

Q. But you had subordinates under your supervision that you expected to do that.

A. Yes.

Q. What person did you expect to fulfill that?

A. Charley Norris was our personnel manager.

Q. Do you recall, before Mr. Kirkingburg was terminated, that Charley Norris presented you with any kind of verbal or written report about the results of his search?

A. Charley and I had conversations on the fuel -- the tire man and the yard hostler. I don't recall any others.

Q. And you testified earlier that you weren't really sure whether those conversations took place before or after Mr. Kirkingburg's termination; is that correct?

A. Yes.

Q. What can you tell me were the substance of the

[105ER] yourself, about why that would be an appropriate job for Mr. Kirkingburg to perform?

A. Well, he's a driver, and you had to be able to drive to do that job. You know, you had to be able to handle the equipment to do that job. It was felt that that was a reasonable alternative to him driving on the road.

Q. When you say as an alternative to be driving on the road, where does the yard hostler drive these trailers?

A. Within the confines of the facility.

Q. So they're not allowed to go outside?

A. Oh, under -- if they are fully certified, yes, they do go out.

Q. But they don't necessarily have to.

A. They don't necessarily have to.

[106ER] Q. Now, did you receive any report back from Mr. Norris or Ms. Pike or anybody else about the interaction between Albertson's and Mr. Kirkingburg on the tire man job?

A. Yes. I was told by Norris that he had refused the -- the offer.

Q. Did he say anything else besides that?

A. He just said Mr. Kirkingburg said he was a driver and that's all he wanted to do, is drive.

Q. Is there anything else that Mr. Norris reported back to you from that conversation?

A. Not that I recall.

Q. How about a report back concerning the yard hostler position? What do you recall hearing about that?

A. I -- the only thing that I -- report that I got was that he

had -- that he had -- had rejected it. I don't -- I didn't hear any further.

Q. Who told you that he had rejected it?

A. I'm not real sure. I think it was Charley Norris.

Q. Did you make any decision to withdraw the offer of the yard hostler position?

A. I did not.

Q. Did you hear that it had been withdrawn by anybody else?

A. No, not really.

[55SER] Q. Did you have anything to do with making the decision to give him another examination, at the time that he was released to go back to work in November of '92?

A. Yes.

Q. What discussion did you have with anyone about that subject?

A. I directed Norris and Sturgill that he was returning from injury, that he would be -- have to be recertified, which we do, DOT certification physical.

Q. How often did you do that and under what circumstances, when somebody was returning from injury leave?

A. That all -- everybody who returns from injury leave is recertified.

Q. I mean, even like after one day or three days, or what?

A. Oh, no. Extended period of time.

Q. Is there any rule?

A. Not that I know of.

Q. Exhibit 1 is a policy. Have you seen this document before?

[56SER] A. Today is the first time.

Q. It says here, "The company will afford reasonable accommodation to applicants and employees with a known

disability as long as such accommodation does not cause undue hardship to the Company."

Can you tell me what undue hardship it would have caused to Albertson's to have accepted the vision waiver?

MS. GORDON: Object, to the extent it calls for a legal conclusion.

Go ahead and answer, if you can.

THE WITNESS: The only concern we had -- still had, as far as I know, is pure and simple safety, the safety of a person who has a vision problem driving a rig. We considered that to be the -- the risk to be too great. I don't know that --

The answer to your question is that the only undue hardship would be the potential risk to the company of a tremendous loss involved in an accident.

BY MR. BUSSE:

Q. To your knowledge, while he was driving for Albertson's, was he a safety hazard?

A. Not that I know of.

Q. Exhibit 2, this is an excerpt from the Albertson's distribution center driver's manual. He wasn't terminated [57SER] for violating any policy, that you know of, in the driver's manual, was he?

MS. GORDON: Take whatever time to read it, if you want to.

THE WITNESS: Let's see. No.

[57SER] Q. I've been given some other documents. There's a photocopy of his driving history. He wasn't terminated because of anything that appears on Exhibit 3, driving history, was he?

A. No.

Q. And I've been given a copy of his statement of compliance with the distribution center personnel policies. He wasn't terminated for violating any personnel policy, that you know of, was he?

A. No.

Q. And I've been given a copy of an incident record, something that happened back in 1990. He wasn't terminated for any warning notice that he received then, was he?

A. No.

Q. I've been given an absentee calendar. He wasn't terminated for anything that appears on the absentee calendar '91, Exhibit 6, was he?

A. No.

* * *

[107ER] Q. So in all cases of a practical matter, they're not supposed to go outside the yard.

A. With the equipment they're using. I presume that all of them there are still certified drivers that can, if they have the appropriate equipment to go outside the yard. But the job can -- it has been structured so it could be retained in the yard.

Q. Do you know of anyone who was a yard hostler who was not DOT certified?

A. No.

Q. Why would somebody be DOT certified and, yet, not be a driver but a yard hostler? I mean, it doesn't sound like something they'd choose to do.

A. They probably wouldn't choose to do it. Again, it's a combination -- that job can be performed by someone who does not have to go -- that doesn't necessarily have to go on the street. So that would be some accommodation. Or if they found an appropriate individual who could do the job extremely well but didn't want to drive on the street, then you have someone -- you could do that.

Q. Have there been people like that?

A. We've had people who were not permitted on the [108, 109ER] street as a yard hostler, yes.

Q. What would be some of the reasons that they're not permitted on the street?

A. License restrictions, not necessarily DOT, but restrictions that they not be -- temporary restriction, not be allowed to drive.

Q. Because of some other problem --

A. Alcohol, or something of that nature.

Q. So, license restrictions. What would be some of the other reasons, in your experience, that people have relied upon to get that assignment?

A. I haven't had anyone approach me on the thing, and so --

Q. Is it a permanent or temporary assignment?

A. It's -- I guess depends whether you want to stay there and do the job all the time. There are opportunities to get out of that job. Let's say a driver is a license -- a certified driver and wants to go back on the street. He simply, when it's his turn to bid, bids on the run to go on the street, and then someone else fills that job.

But if you want to stay there, you can, in all probability. I would imagine there are people that have been hostling since day one, people who don't like to be aware from home overnight or ---

[110ER] MS. GORDON: Are you speaking from direct knowledge now, Frank, or are you guessing?

THE WITNESS: Guessing.

MS. GORDON: Well, don't guess, please.

THE WITNESS: Well, let me rephrase. No, that is not necessarily true. I have direct knowledge that the job can be permanent, if they choose to be. That's not a guess.

BY MR. BUSSE:

Q. Did you know that, after his termination, Mr. Kirkingburg was requesting the assistance of Albertson's to help him get a vision waiver?

A. I was apprised of that, yes.

Q. Who apprised you of that?

A. Charley Norris, the personnel manager.

Q. Did you give him any instructions as to whether or not

--
MS. GORDON: Let him finish his question.
BY MR. BUSSE:

Q. Did you give him any instructions as to whether or not to assist Mr. Kirkingburg in obtaining that vision waiver?

A. I told him not to; that we would take that up with our corporate people, and we did so.

* * *

[58SER] Q. Had a vision-waiver issue come up prior to that time?

A. Not that I'm aware.

Q. Did a vision-waiver issue come up after that time?

A. I'm not aware of one.

Q. What discussions do you recall having with Scott Jardine on the issue of whether or not to accept a vision waiver?

A. Well, my discussions had to do with the two -- do some research within the company to find out whether we had any -- anyone on waivers, to -- basically, to determine what the company's position would be on the matter.

Q. Okay.

A. And to so advise.

Q. When you say "so advise" --

A. Well, to get back to me on what his findings were and to our -- to his counterparts in Boise, the labor relations people.

Q. And what did he advise you?

A. He told me that we had no one on waivers in -- any driver on waivers throughout the entire company.

Q. Did he give you any other information as to what the position would be in Boise as to whether or not to accept vision waivers?

[59SER] A. At that point, the decision was not to accept them.

Q. So did you make that decision --

A. No, I --

Q. -- or did they make that decision?

A. It was a decision given to me.

Q. Okay.

A. Or, I -- perhaps that -- a decision that I made and that was agreed to in Boise with Scotty, and the corporate people agreed to that decision.

Q. So you're saying you made the decision, and they supported you?

A. I -- No. It was a corporate decision. Let's say I was a party to making the decision.

Q. When you say "it was a corporate decision", what do you mean?

A. Well, they could have easily overrode me without any problem.

Q. So did you say, "This is what I decide, and I want your approval," or did you say, "That is what I think. What do you think?," and then it was a joint decision, or -- I need your best description of how that decision was reached.

A. Well, what it -- I discussed the situation with Jardine. He then discussed it with others and researched the company, and he got back to me and said, "This is

* * *

[111ER] A. I directed Norris to look into the matter, and I assumed that would be part of the follow-up.

Q. In Exhibit 47, it says, "The first position was a yard hostler. The second position was working in the shop. Mr. Kirkingburg declined to accept either of these positions."

Do you have any information that Mr. Kirkingburg declined the yard hostler position?

A. Only as it was relayed -- related to me from Dona King.

Q. In Exhibit 48, February 28th, 1994, Ms. King's -- I'm

sorry. Dona Adams Pike? Is that who you're talking about?

A. Yeah. I think she's married -- Pike was her name, Dona Pike.

Q. There we go. In Paragraph 2 of Exhibit 48, Page 1, it says, "When the position of yard hostler was offered, Mr. Kirkingburg did not immediately accept it, and although the company had intended to restrict Mr. Kirkingburg to driving in the yard only, we became concerned because the position does require DOT certification. Accordingly, the offer of this position was withdrawn."

Were you aware that the offer of the yard

* * *

[112ER] Q. Did those persons also discuss with you, not as lawyers but also as personnel administrators, this issue?

A. No. Most of what I had to say with those folks was related to the company's position. I would consider that to probably be more legal than anything else.

Q. The corporate decision?

A. Well --

Q. Whether or not to accept the vision waiver, isn't that a policy decision that somebody reached?

A. I don't know that.

Q. Interrogatory 2, "Please state why Plaintiff was terminated." "Answer: Plaintiff was no longer able to drive for Albertson's under the term of Albertson's company regulations. He was offered and refused accommodating employment. Because of his refusal of these employment opportunities, plaintiff's employment with Albertson's was terminated."

Is that true?

A. It's true. However, he wasn't terminated because of his refusal. He was term -- the termination date, obviously, would have preceded that. However, it is not uncommon for us to review all terminations -- or, any termination and rescind

that, based on the decision -- based on the circumstances at hand.

Q. So what you're saying --

[113ER] A. I'm thinking that was probably a broad -- I mean, a narrow answer to that question. My statement would be that his -- his -- I can't tell you about the dates. All I can tell you, had he accepted those, he would have been employed. Had he accepted either one of the offers, he would have been employed, with no loss of seniority or time.

Q. But you're also saying that it's incorrect that he was terminated for refusing them, because he didn't refuse them until after his termination; right?

A. That's correct.

Q. Okay.

A. I think that's correct. It could -- Again, Charley Norris had much of the communication, so it is possible that some conversation happened that I'm not aware of prior to that. But I know, had he -- had he accepted either one of those, he would have been working.

* * *

EXAMINATION

By Ms. Gordon:

[61SER] Q. Did Mr. Kirkingburg ask you about any accommodation, other than asking you to accept a vision waiver?

A. Not me.

Q. Do you know if he asked anybody about any accommodation, other than saying he wanted to drive and that he wanted to use his vision waiver?

A. To the best of my knowledge, he did not.

Q. To your knowledge, did he ask anybody about a job in the warehouse?

A. He did not.

Q. And as far as you know, had he ever indicated he had any interest in working in the warehouse?

A. He did not.

Q. I'd like to go back to Exhibit 2 that Mr. Busse asked you about, the driver's manual. There's reference in here to -- And I'm reading from the third paragraph on the final page of this excerpt, which is Page 5. It says, "As an Albertson's driver, you are required to comply with [62SER] all Department of Transportation, Interstate Commerce Commission and Company safety rules."

Did Mr. Kirkingburg's termination have anything to do with that requirement?

A. Yes.

Q. In what sense?

A. Well, he failed to meet the minimum DOT requirements, visual requirements, which would be covered under that sentence.

Q. And did it also concern safety?

A. Yes, absolutely. Safety's the entire -- primary concern of the company.

* * *

RIDDLE EXHIBIT #2

Albertsons

I, _____
NAME

RECEIVED ALBERTSONS
PORTLAND DISTRIBUTION CENTER
DRIVER'S MANUAL ON

DATE

SIGNATURE

Dated 10/94

The first Albertson's Food Center was opened in Boise, Idaho, at 16th and State Street in July of 1939, under the personal management of Joe Albertson. The first year's operation was successful and in 1940 stores were opened in the adjoining towns of Nampa and Caldwell, Idaho. Since that time, the Company has grown to 689 modern food stores located in 19 Western, Midwestern and Southern states. Albertson's has 17 division offices and retail operations are supported by 11 Company-owned distribution centers.

It is strict policy of our Company to deal honestly with all employees, customers and suppliers. All employees are expected to comply with this policy.

We are an equal opportunity employer. We guarantee to all persons the opportunity to work and earn a living according to their abilities and qualifications, with regard to considerations of race, color, religion, national origin, sex or age. It is our policy to insist upon strict compliance with both the letter and the spirit of this law, by and among all employees, on all levels in every division of our Company.

Every employee is vital to Albertson's success. It is our philosophy that 50% of our salary is paid for the service we render the customer, and 50% for the other work we do.

VEHICLE SAFETY

Of all your responsibilities as an Albertson's driver, your safety responsibility is the most important, above all, driver safety. Safety comes first. In the operation of all equipment, regardless of all other requirements, proceed safely. Never drive into uncertainty.

The constant practice of defensive by being alert, using good judgment and taking no chances, will prevent most accidents

before they occur. Because of the hours you put in behind the wheel, it becomes very easy for you to let your safety awareness slip. This can be a fatal mistake. Basically, safety is an attitude that will keep you both consciously and subconsciously safety alert. We will help you directly with incentives such as safety award programs for safe operation. Indirectly, Albertson's will constantly provide you with safety reminders and checklists.

As an Albertson's driver, you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules. You have been issued a Motor Carrier Safety Regulations manual and you are required to abide by its instructions. This compliance is nothing new to professional line operators and comes with the job. There are, however, some safety guidelines that Albertson's feels should be stressed and these are listed as follows:

1. Drivers must stay within the hours of service regulations set forth by the D.O.T. If you are low on hours, contact your dispatcher so that you will not be dispatched without proper rest. Logs must be kept up to the last change of duty.
2. Drivers are required to operate their equipment at speeds consistent with the existing laws in each state and with road and traffic conditions. Albertson's maximum speed limit is 55 MPH.
3. Always make certain that you have all the necessary safety equipment before you start a trip, which are (a) full fire extinguisher rated 5 B:C. or (b) 4 B:C. Securely mounted. Replacement fuses, unless circuit breakers are used. Three red emergency reflectors, which satisfy the requirements of paragraph (i) of this section, and two red flags, or three red emergency reflective triangles, which

satisfy the requirements of paragraph (h) of section 393.95 of Motor Carrier Safety Regulations, and three fuses.

4. Always be sure to check for sufficient clearance before changing lanes on interstate highways, when backing and in making right hand turns. Be careful.
 5. Before each trip, check your fifth wheel to make certain that it is locked and that the landing gear on the trailer is raised and locked into position.
 6. Be certain that all underpasses and overhanging docks have a minimum of 13 foot, 5 inch clearance for your trailer.
 7. Truck accident experience has indicated that the most accident prone time for drivers is just before the early morning hours of daylight. Be especially safety conscious during this period of the day.
-

DEPOSITION OF GLEN SAYLER, MD

DIRECT EXAMINATION

* * *

By Ms. Gordon:

[78SER] Q. Did Mr. Kirkingburg have a partial color deficiency?

A. No.

Q. What test do you use for color?

A. I don't remember the name of it. Ishihara's.

Q. That little black book?

A. That little book, yeah, with the pages in it.

Q. And on each page is a circle, and if you can recognize the number, your color vision is pretty good; is that right?

A. Right.

Q. And what field of vision, if any, test did you do on him?

A. Confrontation, you know.

* * *

[79SER] Q. Now let's go to HK MD 00011. Can you tell us about that?

A. (pause; referring). What do you want me to tell you?

Q. Is this -- You had personal involvement with that --

A. Yes.

Q. -- document as well? What was your involvement?

A. Same as with the previous one.

Q. Did you certify Mr. Kirkingburg?

A. Yes.

Q. What was his acuity?

A. 20/15 on the right, 22/100 on the left.

Q. So his left eye had worsened; is that right?

A. Not necessarily.

Q. What was the date of that test?

A. 4/25/88. Actually, based on that, it couldn't have worsened because that was two years previously.

Q. So this one was 1990? Document No. 12 was 1990?

[80SER] A. That's what it says.

Q. And '88. So in two years, how -- do you have any explanation for how his eye could have gotten that much better?

A. That's within the range of variability from one time to the next.

Q. Do you have any understanding whether Mr. Kirkingburg has amblyopia in his left eye?

A. I don't know.

Q. Do you know if he has an eye disease or an eye injury?

A. I don't know.

Q. And how do you explain that type of an improvement in a two-year period?

A. Like I said, it's within the range of variability. You can do the same test two days in a row and you may get that variability.

Q. And did you pass him for the same reasons you've already described in regard to Exhb. 12?

A. Yes.

Q. What was his field of vision at the time of Exhb. 11?

A. Says 90 degrees both sides.

Q. And his color was still good?

A. Yes.

[81SER] Q. At that time you were filling out the bottom portion; is that right?

A. Yes.

Q. Let's look at Exhb. HK MD 00013. Is that a DOT physical exam that you gave Mr. Kirkingburg?

A. Yes.

Q. When was that?

A. 1992.

Q. And what was his acuity rating in 1992?

A. 20/25 on the right, 22/100 on the left.

Q. Did you pass him again in 1992?

A. Yes.

Q. And is that again because you thought he was okay to drive because he'd been driving?

A. Yes.

Q. But again, he would not have passed the DOT physical; is that right?

A. Technically not.

Q. There's something written here. Can you read what that is? It's just to the right of the acuity ratings.

A. (pause; referring). Without correction, right 22/100, left, I can't tell because it's not an adequate copy to tell what the left was.

Q. Okay. Thank you.

DEPOSITION OF THEODORE STURGILL

DIRECT EXAMINATION

By Mr. Busse:

[115ER] Q. As of 1992, November, were you acquainted with the employment of Mr. Kirkingburg?

A. Yes.

Q. And what did you think of him as an employee of Albertson's?

A. He was an average -- average driver.

Q. All right. What is your understanding of the reason why he was terminated?

A. Failure to pass a DOT physical.

Q. Was it your decision to terminate him?

A. No.

Q. Whose decision was it?

A. Boise legal.

Q. When you say "Boise legal", that usually means a person. Who is that?

A. I don't know who made the final decision.

Q. Who communicated to you that the decision was made by Boise legal?

A. The decision came to me from Frank Riddle.

Q. What did Mr. Riddle say? What were his words?

A. I don't remember exactly what his words were.

[116ER] Q. In substance.

A. That he had failed the visual part of the DOT and we were not taking waivers below the DOT minimum standard.

Q. In the context of explaining why he was terminated?

A. What was your question again?

Q. Well, we got into this by asking what is your understanding of why Mr. Kirkingburg was terminated. You recall that; right?

A. Yes.

Q. Okay. So when I asked you what Mr. Riddle said on that subject, you said, "He had failed his visual" and "We're not taking waivers". And my question to you was, in the context of explaining to you the reason for Mr. Kirkingburg's termination; is that correct?

A. Yes.

Q. Did Mr. Riddle also say who made the decision?

A. It was legal, Boise legal.

Q. Is that what he said?

A. I don't remember the exact words.

[117ER] Q: An average worker for the company. Apart from the fact that he was let go for the reason that you stated associated with the vision problem, is there any other reason that he was terminated?

A. No.

Q. It had nothing to do with his driving record?

A. No.

Q. Or any warnings or disciplinary actions he'd received?

A. No.

Q. Or his injury 801 claims, filings?

A. No.

Q. Or his attendance record?

A. No.

[118ER] A. Contacted Mr. Kirkingburg and told him that he was terminated.

Q. Had you been directed to tell him that?

A. Yes. He could not pass the minimum DOT.

Q. And had you been directed by someone to terminate him because of that?

A. Yes.

Q. Who directed you to do that?

A. That came from Boise legal.

Q. What person directed you to terminate him?

A. Frank Riddle.

Q. Okay, thank you.

In the conversation that Mr. Riddle and you engaged in which he directed you to terminate Mr. Kirkingburg, was there any discussion about any other work Mr. Kirkingburg could perform?

Q. I don't remember.

Q. You don't remember any discussion to that effect?

A. Most -- most all of this was handled between Boise and legal.

Q. That's fine. All you can tell me is what you know. Do you recall any such discussion?

A. Some conversations where there was a position for a tire person and a position for a yard hostler.

Q. Now, I'm talking about as of the time that you were [119ER] given direction to terminate him, as of November 20th, 1992, was there any discussion in that conversation?

A. I don't remember.

Q. Okay. Before terminating Mr. Kirkingburg, did you discuss with anybody in any other conversation the subject of whether there was any other work for him to do?

A. I don't remember.

Q. Did you discuss with Mr. Norris, the personnel manager, whether or not there were any openings available, to your recollection?

A. No, I don't remember.

* * *

[119ER] Q. Okay. You've told me about one conversation that you had with Mr. Frank Riddle in which he told you, "We're not going to accept a vision waiver. Terminate Kirkingburg;" right?

A. We don't accept anything below DOT minimum [120ER] standards on the waivers, and that's -- that's in the DOT regulations.

Q. Okay. You've just made a statement that's nonresponsive, but I will follow up, and then I'll go back.

Where does it say in writing, at Albertson's, that you will not accept anything below the DOT standards?

A. That's from Boise.

Q. Have you ever seen anything in writing to that effect?

A. No.

Q. Prior to November 20th, 1992, did you see anything in writing that was published by Albertson's that they would not accept a vision waiver?

A. No.

Q. Now let's go back to my question.

A. Okay.

Q. Apart from your conversation with Mr. Riddle in which he directed you to terminate Mr. Kirkingburg, before speaking with Mr. Kirkingburg to terminate him, did you have a conversation with anybody else on that subject, to your recollection?

A. Not to my recollection.

Q. In the conversation with Mr. Riddle, did the two of you discuss what it was about his vision that caused [121ER] the company concern?

A. That he was legally blind, or blind in one eye.

Q. Are those the words that Mr. Riddle used?

A. Yes.

Q. What was your understanding, at the time that you spoke with Mr. Kirkingburg, as to what the test that he has been most recently given by the company doctor showed as to what his vision was?

MS. GORDON: Object to form.

Answer if you can.

THE WITNESS: I don't remember the exact reading from the doctor.

BY MR. BUSSE:

Q. Did you, at one time, have that information?

A. Yes.

Q. Did you have it as of the time that you spoke with Mr. Riddle?

A. Yes.

Q. How did you get it?

A. The DOT recertification forms come back to us to go into the driver DOT file.

Q. When you say "the certification forms come back to us", you're referring to the forms that are filled out by the doctors?

A. Yes.

[122ER] Q. The examining physicians.

A. Yes.

Q. And so they come back to -- when you say "us", who in the company at that distribution center would have been the person to have received the form?

A. It could have come into my office.

B. When you say your office, are you talking about a secretary? To you personally?

A. Personally.

Q. To you; right?

A. Yes.

Q. And what do you do with it?

A. I give it to the safety supervisor, and he puts it in the DOT file.

Q. Who is the safety supervisor? Who was that, at that time?

A. I'm not sure.

Q. Is that person at the distribution center?

Am I using the right nomenclature? Is that called the distribution center?

A. Yes.

[123ER] Q. When you say "DOT file", is that for that particular individual, or would that be for all DOT examinations?

A. Particular individual.

Q. So each person has their own DOT file; right?

A. Yes.

Q. And that file, then, should contain the certifications that are received by you for what period of time?

A. They have to be recertified every two years.

Q. And so for what period of time were you involved in this process as it pertained to Mr. Kirkingburg?

A. Well, I'm over the department, so the total time that he

was there.

Q. So you would have received his prior certifications; correct?

A. Yes.

Q. What is your understanding as to who issues the card, the DOT card, to the driver?

A. It would be the examining physician.

Q. Does that examining physician then issue that certification directly to the driver, or does that go to you, as well?

[124ER] Q. Did you take any action to attempt to find him work, after that time?

A. I did not.

Q. Do you know of anyone who took it upon themselves to try to find him work?

A. I know that there was discussion, but it was handled through Boise and personnel.

Q. Were you a party to any such conversation?

A. I don't remember.

Q. Do you recall ever offering Mr. Kirkingburg a trailer-moving job?

A. I don't. I know the hostler position was discussed, but I don't remember offering it to him. I think that, again, that was either Boise or personnel that did that.

Q. I said "trailer moving" and you said "hostler". Is a hostler the same thing as a trailer mover?

A. Yes.

Q. Could you explain for us, for the record, what a yard hostler does.

A. A yard hostler moves empty trailers into the dock, [125ER] loaded ones out away from the dock, and stages them for dispatch on the road.

Q. Did you know of any yard hostler position that was

available about that time?

A. I'm not sure. You know, I don't remember.

Q. How many yard hostler positions were there?

A. Six.

* * *

[125ER] Q. Do you recall any conversation that you had with Mr. Ed Vandenderen -- I know that's not how you pronounce it, but you know who I'm talking about -- about whether there was any warehouse work for Mr. Kirkingburg back then?

A. I do not.

[126ER] Q. Was it your understanding that the company went by whatever requirements or physical requirements the DOT established?

MS. GORDON: Object to form.

Answer, if you can.

THE WITNESS: They operate by DOT rules and regulations.

BY MR. BUSSE:

Q. And so if the DOT changes those rules and regulations, is it your understanding that Albertson's would, therefore, change its requirements?

A. They don't have to change their requirements. They can have stricter requirements than the Federal DOT.

Q. Well, do you know of anything that Albertson's publishes in the nature of physical requirements that is stricter than the DOT? Or does it just use DOT?

A. I don't know of anything.

Q. As far as your experience with Mr. Kirkingburg, was he a safe driver for you at Albertson's?

A. He was an average driver, a safe driver.

Q. In any prior year, when you received that doctor's certificate concerning the examination that had been given to Mr. Kirkingburg regarding his vision, was there a red flag

raised when you examined that certificate?

A. It could have been the vision.

* * *

[127ER] A. No.

Q. Do you know of any reason why Mr. Kirkingburg could not have fulfilled the requirements of that yard hostler position?

A. He would have to have a valid DOT physical.

[128ER] Q. A valid DOT physical --

A. Yeah.

Q. -- or a valid DOT card?

A. Card, medical card.

Q. That's issued by the doctor; right?

A. Yes.

Q. So if he had the valid DOT card, that should have been sufficient; right?

A. If he had the medical card, yes.

A. Did he have the medical card, at that time? Or do you know.

A. I don't know. You know, he did not pass the vision test, so he would not have had a card.

Q. That's your assumption; right?

A. Yes.

Q. What is your understanding of what his vision was prior to 1992? Do you recall what his vision was in 1992?

A. No, I don't.

Q. Do you recall whether or not he had a valid DOT card in 1991?

A. He did. He was driving for us.

Q. Do you recall whether or not he passed the physical in 1991?

A. If he was driving, yes, he passed.

Q. And in 1990, did he have a valid card?

[129ER] A. Yes.

Q. Did he pass the physical in 1990?

A. Yes.

Q. And in 1988, did he have a valid card?

MS. GORDON: Object. That's outside the scope of his employment period with Albertson's.

BY MR. BUSSE:

Q. You were a truck supervisor in 1988; right?

A. Superintendent, yes.

Q. Truck superintendent. In 1988, did he have a valid card?

MS. GORDON: Object. The plaintiff did not work for Albertson's in 1988, and this is outside -- There's no foundation for this question.

BY MR. BUSSE:

Q. You worked for Albertson's in 1988, did you not, as a truck superintendent?

A. Yes.

MS. GORDON: Mr. Kirkingburg didn't. Your client didn't. He didn't work for Albertson's until 1990.

BY MR. BUSSE:

Q. Do you know, from what you saw, whether or not he had a valid card in 1988?

A. No, I don't.

[130ER] Q. When you were a truck superintendent, what were the differences in your responsibilities?

A. The drivers and the dispatch supervisors was my basic responsibility.

Q. And so were you promoted to transportation manager in 1990?

A. Yes.

Q. What additional bodies or employees came under your supervision at that time?

A. The total department and the maintenance facility, the garage.

Q. When Mr. Kirkingburg was first employed, were you responsible for seeing that that person had a valid DOT card?

A. Yes.

Q. Valid medical certificate?

A. Yes.

Q. Did Mr. Kirkingburg have a valid card and certificate, at the time he was employed?

A. If he was employed as a driver, yes.

Q. That would have been your job at the time, to check that out; right?

A. Yes.

[131ER] BY MR. BUSSE:

Q. I'm going to show you what's been marked as Exhibit 1. It was marked as Exhibit No. 41 in Mr. Kirkingburg's deposition. And this is the EEO statement of Albertson's where it says, "The Company will afford reasonable accommodation to applicants and employees with a known disability as long as such accommodation does not cause undue hardship to the Company."

Would you please tell me what undue hardship was caused to Albertson's by reason of the requested accommodation to allow him to drive with a vision waiver?

MS. GORDON: Object to form.

Answer, if you can.

THE WITNESS: The liability.

BY MR. BUSSE:

Q. What liability?

A. Of moving a truck up and down the road with, you know, a vision problem.

Q. Had he gotten into an accident before?

A. I can't answer that. I don't know.

Q. Do you know of any accident that he had, prior to [132ER] his termination, while a driver at Albertson's?

A. I'm not aware of -- at this time, no.

Q. Is Exhibit 2 an excerpt from the distribution center

driver's manual?

A. Yes.

Q. Exhibit 3, would you regularly get a driving record or motor vehicle driving printouts?

A. Yes.

Q. Is there anything on Exhibit 3 that was disqualifying to Mr. Kirkingburg or was related to his termination, as far as you know?

A. None.

Q. Exhibit 4 was provided to us having to do with a statement of compliance with the policy manual, with a copy of the Portland distribution center personnel policies. Was he terminated for violation of any of the personnel policies, as far as you know?

A. No.

Q. Exhibit 5 is a copy of an incident record that I've received, and it has a warning notice attached to it, and there was something having to do with November 30, '90, dispatch to Spokane. Did this warning have anything to do with his termination?

A. No.

[133ER] Q. Exhibit 18, what is that document, please?

A. That's a medical examiner's certificate.

Q. Does that appear to be a valid DOT certificate? When you say "card", "certificate" and "card", they generally refer to this as a card; right?

A. Yes.

Q. Does that appear to be a valid DOT card?

A. It's -- the only -- It doesn't. It doesn't have the examining doctor's signature on it.

Q. This is the kind of card that you would expect a driver to be issued; right?

A. Yes.

Q. Exhibit 19, do you know whose handwriting that is?

A. No, I don't.

Q. There appears to be the word "peripheral", "Loses peripheral acuity". Do you recall any discussion with Mr. Riddle about that particular subject?

A. No, I do not.

Q. Exhibit 20, can you identify this document?

A. Yes. It's a certification of a road test, a driving test given to each driver that we employ.

Q. Is that your signature?

A. Yes.

Q. So would that have meant that you went on a road [134ER] test with Mr. Kirkingburg and found him to be a safe driver?

A. Yes.

Q. This is something that you're supposed to do yourself; right?

A. That's a DOT requirement, road testing drivers.

Q. Exhibit 21, is this another medical certificate?

A. Yes.

Q. Now, this is 1988, and this is Tillamook. Would you have had that document in your file?

A. No.

Q. Exhibit 22, here's another medical certificate, August 18, 1990. Would you have had that document in your file?

A. Yes.

Q. This is by Robert Eubanks, and that's a doctor that's contracted with Albertson's to fill out those forms; right?

A. Yes.

Q. Where would the original of this document be?

A. In the driver's DOT file.

BY MR. BUSSE:

Q. Exhibit 23, here is February 5th, 1991. This is [135ER] another one of the Eubanks certificates concerning Mr. Kirkingburg; right?

A. Yes.

Q. Do you recall, when it was reported to you that the left was 20/100 with correction, taking any action, at that time, to take Mr. Kirkingburg off the road?

A. I do not, no.

Q. With that test result, was it your understanding that he met the DOT standard, or not?

A. Yes. It was filled out and signed.

Q. What are you looking at?

A. I'm looking at his medical examiner's card.

Q. So as long as they fill it out and sign it, you don't care what's above that? Is that what you're saying?

A. We review those, and we -- you know, we check the blood pressure and look at it. But the doctor does the physical. I'm not a doctor.

Q. Do you have an understanding as to what DOT requires, in terms of visual acuity, with regard to the quality of the eyesight with corrective lenses?

A. There's -- there's regulations in the DOT manual, regulation manual. We refer to them if we have a question.

[136ER] Q. Was it your decision to send Mr. Kirkingburg to the Eubanks Clinic in Gresham for an examination on November 6th?

A. We send all drivers in for recertification to Dr. Eubanks' office on long-term injuries.

Q. Well, is there a policy to that effect, a written policy?

A. It's a policy that we do. All drivers are to be [50SER] recertified from a long-term injury.

Q. Is there a written policy?

A. Not to my knowledge, no.

[137ER] Were you any part of such review?

A. No.

Q. He says, "We appreciate your consistent job performance."

Did you appreciate Mr. Kirkingburg's performance?

A. Hallie was an average driver, he was a good driver.

Q. Exhibit 35 is a note from Scott to Bruce. Who is Scott Jardine?

A. He's the corporate director of transportation.

Q. Where is his office?

A. Boise.

Q. Had you had any other drivers with vision problems besides Mr. Kirkingburg, since becoming the transportation manager at Albertson's?

A. Not to my knowledge, no.

Q. Did you learn, at some point in time, that Mr. Kirkingburg had received a vision waiver?

A. Yes.

Q. And how did you learn that?

A. I don't remember where the information came from.

[138ER] Q. With regard to the vision waiver itself, was there any discussion as to whether or not Mr. Kirkingburg's vision waiver was valid or not? Was that ever an issue, to your knowledge?

A. Not to my knowledge, no.

Q. You were transportation manager as of June 4th, 1993; correct?

A. Yes.

Q. Do you recall having received Scott Jardine's memorandum of that date to all transportation managers on the subject of driver qualifications?

A. No, I don't.

Q. Would you have been routinely included on [139ER] correspondence that was addressed to persons having that job title?

A. Yes.

Q. Now, this is on the subject of DOT waivers. Do you recall any earlier writing than June 4th, 1993, on the subject of waivers?

A. I do not.

Q. It says, "We should continue to apply the minimum standards of the DOT to applicants and employees. In situations where reasonable accommodations to a driver with a disability are legally required, our priority is to accommodate the driver in ways other than a DOT minimum qualification waiver."

My question to you is, to your recollection, were you involved in any accommodation of Mr. Kirkingburg in ways other than accepting the DOT waiver?

A. No.

Q. Was there ever any discussion about going to Mr. Kirkingburg, because there appeared to be some inconsistency in his physical records as to what his eyesight exactly was, to go back and get another exam?

A. Not to my knowledge.

Q. Or to try to get his history from his own doctors?

A. Not to my knowledge.

STURGILL EXHIBIT #1

EQUAL EMPLOYMENT OPPORTUNITY POLICY

NONDISCRIMINATION POLICY

The Company is committed to afford all qualified individuals an equal opportunity to pursue employment and advancement opportunities. There shall be no unlawful discrimination against any person or group based upon race, color, creed, religion, national origin, sex, age, disability, or veteran status or other classification that may be protected under the law in training or apprenticeship, advancement, use of facilities, compensation, or any other conditions of employment.

REASONABLE ACCOMMODATION

The Company will afford reasonable accommodation to applicants and employees with a known disability as long as such accommodation does not cause undue hardship to the Company. The Company will also afford reasonable accommodation for an employee's religious beliefs as required by law.

OBLIGATION

Every member of management will abide by the Company policy of nondiscrimination, equal employment opportunity, and reasonable accommodation. In addition, management shall insure that all notices required by law to be posted, including notices received from the Company or Equal Employment Opportunity Commission. All employees are expected to conduct themselves in a manner that is not offensive as to the sex, race, color, creed, age, religion, national origin, disability, or veteran status of any employee.

• Federal law prohibits discrimination on the basis of disability
when the Americans with Disabilities Act becomes effective
on July 26, 1992

STURGILL EXHIBIT #3

PAGE 1

DATE PRODUCED MOTOR VEHICLE DIVISON
07/24/90 89184

LIC NO. 3261558 KIRKINGBURG, HALLIE ELLSWORTH
203 HWY 101 DOB 05/21/38
PO BOX 542 RESTRICT B
GARIBALDI OR 971180000
EXPIRES 05/21/94 LIC TYPE - A MR725526
ENDORSE - TX CDL - YES

**** DRIVING RECORD ENTRIES AND STATUS
AS OF 07/24/90 ****

CONV 12/28/84 01/08/85 VBR J-TILL 013376 IB
CONV 09/07/88 09/26/88 LK/SFT LD J-TILL 302415 IB

THE UNDERSIGNED, BEING DULY APPOINTED AND
HAVING WITHIN MY CUSTODY THE RECORDS OF
THE MOTOR VEHICLES DIVISION OF THE
DEPARTMENT OF TRANSPORTATION OF OREGON,
HEREBY CERTIFIES THAT THE FOREGOING DRIVING
RECORD COPY IS A CORRECT TRANSCRIPT OF THE
SPECIFIED DATA CONTAINED WITHIN THE DATA
PROCESSING DEVISE OR COMPUTER.

SIGNED UNDER THE SEAL OF THE DIVISION THIS
24TH DAY OF JULY, 1990

ADMINISTRATOR, MOTOR VEHICLES DIVISION

MAIL TO: BY s/ Karl O. Krueger
HALLIE KIRKINGBURG
203 HWY 101
GARIBALDI OR 97118

STURGILL EXHIBIT #20

CERTIFICATION OF ROAD TEST

DRIVERS NAME Hallie Kirkingburg

SOCIAL SECURITY NO 270 34 2921

OPERATOR'S OR CHAUFFEURS LICENSE NO 3261558

TYPE OF POWER UNIT 1988 Kenworth

TYPE OF TRAILER(S) 1980 Utility 50'

IF PASSENGER CARRIER, TYPE OF BUS

THIS IS TO CERTIFY THAT THE ABOVE NAMED

DRIVER WAS GIVEN A ROAD TEST UNDER MY

SUPRVISION ON Theodore Sturgill Aug. 20 1990

CONSISTING OF APPROXIMATELY 18 MILES OF DRIVING

IT IS MY CONSIDERED OPINION THAT HIS DRIVER POSSESSES SUFFICIENT DRIVING SKILL TO OPERATE SAFELY THE TYPE OF COMMERCIAL MOTOR VEHICLE LISTED ABOVE

s/ Theodore M. Sturgill

Albertsons 17505 NE San Rafael Portland OR

STURGILL EXHIBIT #21

PHYSICAL EXAMINATION OF DRIVERS

Name Hallie Kirkingburg
Address 900 2nd St SE, Corvallis, OR 97331
Social Security No 270 34 2921 Date of Birth 8-21-33 Age 56

HEALTH HISTORY

☒ Head or spinal injuries
☒ Seizures, fits, convulsions, or fainting
☒ Excessive consumption of alcohol or drugs
☒ Cardiovascular disease
☒ Tuberculosis
☒ Syphilis
☒ Cancer
☒ Diabetes
☒ Gastrointestinal ulcer
☒ Nervous stomach
☒ Rheumatic fever
☒ Asthma
☒ Kidney disease
☒ Muscular disease
☒ Suffering from any other disease
☒ Permanent defect from illness, disease or injury
☒ Neurological disorder
☒ Any other nervous disorder

DEPOSITION EXHIBIT
21

PHYSICAL EXAMINATION

General appearance and development Good ✓ Fair ✓ Poor ✓
Vision Far vision: Right 20/20 Left 20/20 Distance correction lenses none within correction lenses if worn
Extent of disease of injury Right none Left none Color test passed
Hearing Right normal Left normal Disease or injury none
Audiometric Test (complete only if audiometer is used to test hearing) Decibel loss at 500 Hz none
as 1,000 Hz none at 2,000 Hz none
Throat normal If organic disease is present, it is fully compensated
Heart normal Systolic 120 Diastolic 70
Pulse: Before exercise 72 Immediately after exercise 100 Lung clear
Respiratory: Normal ✓ Abnormal none Emphysema none
Asthma: Yes no If so, when? never Is it cured? yes
Gastrointestinal: Ulceration or other disease Yes no
Genito-urinary: Scars none Urinary discharge none
Reflexes: Babinski normal Pupillary normal Light normal Accommodation Right normal Left normal
Gross Joints: Right normal Increased none Abnormal none
Left normal Increased none Abnormal none
Extremities: Upper normal Lower normal Spine normal
Laboratory and other special findings: Urine Spec. Gr 1.022 A/G 2.0 Sugar none
Other laboratory data (chemistry, etc.) none
Radiological data none (X-ray/fluorograph)
Summary comments Normal physical examination
(Date of examination) 8/20/90 (Address of examining doctor) 17505 NE San Rafael (Name of examining doctor) Theodore M. Sturgill
(Signature of examining doctor) Theodore M. Sturgill

NOTE: This section to be completed only when visual test is conducted by a licensed optometrist.
(Date of examination) (Address of optometrist) (Name of optometrist) (Print)

MEDICAL EXAMINER'S CERTIFICATE

I certify that I have examined Hallie Kirkingburg in accordance with the Motor Carrier Safety Regulations (49 CFR 391.41-43) and with the purpose of the Regulations. I find him qualified under the Regulations.
Qualifying only when wearing corrective lenses.
Qualifying only when wearing a hearing aid.
I completed examination form for this person in my office at 900 2nd St SE, Corvallis, OR
8/20/90 (Date of examination) Theodore M. Sturgill (Name of examining doctor) Theodore M. Sturgill (Signature of examining doctor)
17505 NE San Rafael (Address of doctor) Portland, OR (City and State of doctor)
30 x 542 (Signature of driver)

STURGILL EXHIBIT #22



PHYSICAL EXAMINATION FORM
SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION REQUIREMENTS

To Be Filled In By Examining Physician (Please Print)

Driver's Name Hallie Kirkpatrick
Sex Male Date of Birth MAY 21, 1938 Age 52
Lic. No. 270-34-2021

<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal
<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal

It should be one of the above & one below

General appearance and development: Good

Vision: Far vision 20/20 Right 20/20 Left 20/20
Near vision 20/20 Right 20/20 Left 20/20

Hearing: Right ear normal Left ear normal

Cardiovascular: Heart normal Blood pressure 120/80

Respiratory: Lungs clear Wheezing none

Abdominal: Liver normal Spleen normal

Genitourinary: Urinary normal Sexual normal

Extremities: Upper normal Lower normal

Laboratory and Other Special Findings: None

MEDICAL EXAMINER'S CERTIFICATE

HALLIE E. KIRKPATRICK

ALL 18 1938

Robert E. Hacks

1400 5th St. Kirkpatrick
20138 - PULMONARY STATEMENT OF MATERIAL FACTS IN DISPUTE

This form is to be completed only when the driver has a physical examination.

8/18/90

DEPOSITION EXHIBIT

POC 09116

INSTRUCTIONS ON REVERSE SIDE

STURGILL EXHIBIT #23



PHYSICAL EXAMINATION FORM
SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION REQUIREMENTS

To Be Filled In By Examining Physician (Please Print)

Driver's Name Hallie Kirkpatrick
Sex Male Date of Birth 5-21-38 Age 52
Lic. No. 270-34-2021

<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal
<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal	<input type="checkbox"/> Normal <input type="checkbox"/> Abnormal

It should be one of the above & one below

General appearance and development: Good

Vision: Far vision 20/20 Right 20/20 Left 20/20
Near vision 20/20 Right 20/20 Left 20/20

Hearing: Right ear normal Left ear normal

Cardiovascular: Heart normal Blood pressure 120/80

Respiratory: Lungs clear Wheezing none

Abdominal: Liver normal Spleen normal

Genitourinary: Urinary normal Sexual normal

Extremities: Upper normal Lower normal

Laboratory and Other Special Findings: None

MEDICAL EXAMINER'S CERTIFICATE

HALLIE KIRKPATRICK

ALL 18 1938

Robert E. Hacks

1400 5th St. Kirkpatrick
20138 - PULMONARY STATEMENT OF MATERIAL FACTS IN DISPUTE

DEPOSITION EXHIBIT

POC 00118

INSTRUCTIONS ON REVERSE SIDE

STURGILL EXHIBIT #24

Tillamook Vision Center

Eric Halperin, O.D.

November 9, 1992

Beatrice Halperin Michel, O.D.

To Whom It May Concern:

RE: KIRKINGBURG, Hallie (SS# 270-34-2921)

Mr. Kirkingburg returned to my office today for a vision examination to provide the information needed for his vision waiver. I last saw Mr. Kirkingburg January 24, 1991 for a comprehensive vision examination.

At both visits, Mr. Kirkingburg's visual acuities with spectacle correction were 20/20 right eye and 20/200 left eye. His current glasses provided his best spectacle correction. Posterior and anterior ocular health was within normal limits for both eyes.

The reduced acuity in the left eye is due to amblyopia (ICD-9 368.0). Amblyopia is low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease. In Mr. Kirkingburg's case the amblyopia is caused by a longstanding left eye turn (exotropia ICD-9 378.10). Amblyopia is said to exist if the vision is 20/30 or worse with best correction.

Mr. Kirkingburg has had amblyopia in the left eye since childhood. Mr. Kirkingburg's visual condition is stable and has not worsened since his last vision examination and is not expected to change in the future.

As a licensed doctor of optometry, my opinion is that Mr. Kirkingburg can easily perform the driving tasks required. He has normal visual acuity (20/20) in the right eye, and the amblyopia in the left eye will not interfere with his ability to drive.

If further information or clarification is necessary please contact me by phone to facilitate resolution of this matter.

Sincerely,

s/ Beatrice Michel

Beatrice Michel, O.D.

102 Stillwell • Tillamook • Oregon • 97141
(503) 842-5568

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STURGILL EXHIBIT #25

On 11/20/92 called Hallie Kirkingburg
Failed his DOT physical and a waiver would not granted.

s/ Ted Sturgill

11-20-92 4:45PM

Ted Sturgill called Hallie Kirkingburg and informed him that
he did not pass the D.O.T. physical and we would not sign a
waiver on his failed eyesight.

s/ Bill Frence
11/20/92

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STURGILL EXHIBIT #26



EMPLOYEE STATUS REPORT

Store No.		Job Class		Employee No.		Date	
8252		921		6107494		2	
Employee Name						Phone Number	
Hallie Kirkingburg						270-54-2921	
Position		Department		Job Title		Rate	
Driver		Portland DOT CTR		9252			
TERMINATION							
Enter termination date below and complete questions on reason for							
MONTH	DAY	YEAR	Have all debts to Company been paid?		<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
302	11	20	92	TERMINATION DATE	Have all uniforms been returned?		
469	4	1	9	TERMINATION REASON CODE	Have all keys been returned?		
RATE CHANGE							
Enter rate change date below and complete questions on reason for							
Reason for rate change							
<input type="checkbox"/> ANNUAL <input type="checkbox"/> OTHER							
Enter new rate							
Enter old rate							
Enter new job description or change							
<input type="checkbox"/> YES <input type="checkbox"/> NO							
REASON FOR RATE CHANGE							
51							
JOB CLASS CHANGE							
Enter job class change date below and complete questions on reason for							
Reason for job class change							
Enter new job class							
Enter old job class							
TITLE CHANGE							
Enter title change date below and complete questions on reason for							
Reason for title change							
Enter new title							
Enter old title							
TRANSFER <input type="checkbox"/> LOANER <input type="checkbox"/>							
Enter transfer/loaner date below and complete questions on reason for							
Reason for transfer/loaner							
Enter new location							
Enter old location							
Enter new supervisor							
Enter old supervisor							
Enter new position							
Enter old position							
Enter new rate							
Enter old rate							
Enter new job description or change							
<input type="checkbox"/> YES <input type="checkbox"/> NO							
REASON FOR RATE CHANGE							
139 - PL CONCLUDE STATEMENT ON MATERIAL FACTS IN DISPUTE							
11/20/92							

REASONS FOR TERMINATION

Check Appropriate Box

<p>REDUCTION IN FORCE</p> <p><input type="checkbox"/> 101 Reduction in Force (Permanent)</p> <p><input type="checkbox"/> 102 Reduction in Force (Temporary)</p> <p><input type="checkbox"/> 103 Temporary Hire</p> <p><input type="checkbox"/> 104 Other</p> <p>VOLUNTARY QUIT</p> <p><input type="checkbox"/> 301 To Accept Other Employment</p> <p><input type="checkbox"/> 302 To Leave the Area</p> <p><input type="checkbox"/> 303 To Attend School</p> <p><input type="checkbox"/> 304 To Get Married</p> <p><input type="checkbox"/> 305 To Assume Unemployment Duties</p> <p><input type="checkbox"/> 306 Military Service</p> <p><input type="checkbox"/> 307 Leave of Absence Expired</p> <p><input type="checkbox"/> 308 Abandonment of Job</p> <p><input type="checkbox"/> 309 Disqualified with Working Certificate</p> <p><input type="checkbox"/> 310 Retirement</p> <p><input type="checkbox"/> 311 Pregnancy</p> <p><input type="checkbox"/> 312 Employee's Death</p> <p><input type="checkbox"/> 313 Family Member's Death</p> <p><input type="checkbox"/> 314 Transportation Problem</p> <p><input type="checkbox"/> 315 Other</p> <p>DEATH</p> <p><input type="checkbox"/> 401 Employee's Death</p>	<p>LEAVE OF ABSENCE</p> <p><input type="checkbox"/> 201 Leave of Absence</p> <p><input type="checkbox"/> 202 Unexcused Absence (On The Job Injury)</p> <p>DISCHARGE FOR CAUSE</p> <p><input type="checkbox"/> 401 Failure to Follow Company Policy</p> <p><input type="checkbox"/> 402 Misconduct or Careless</p> <p><input type="checkbox"/> 403 Improper Possession of Company Property</p> <p><input type="checkbox"/> 404 Excessive Absence</p> <p><input type="checkbox"/> 405 Excessive Absence</p> <p><input type="checkbox"/> 406 Drunkenness</p> <p><input type="checkbox"/> 407 Driving Unlawfully During Workday</p> <p><input type="checkbox"/> 408 Discourteous to Customers</p> <p><input type="checkbox"/> 409 Compromising Customers</p> <p><input type="checkbox"/> 410 Failure to Follow Instructions</p> <p><input type="checkbox"/> 411 Work Unlawfully (Criminal)</p> <p><input type="checkbox"/> 412 Violation of Safety Rules</p> <p><input type="checkbox"/> 413 Causing Unrest or Disturbance</p> <p><input type="checkbox"/> 414 Disobedience on Job</p> <p><input type="checkbox"/> 415 Insubordination</p> <p><input type="checkbox"/> 416 Inability to Do Job</p> <p><input type="checkbox"/> 417 Make False Statement to Co-Worker</p> <p><input type="checkbox"/> 418 Improper Use of Drugs, etc.</p> <p><input type="checkbox"/> 419 Under Age Limit</p> <p><input type="checkbox"/> 420 Failed to Report to Work as Scheduled</p> <p><input type="checkbox"/> 421 Other <u>Employee's Death</u></p>
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12 - PL CONCISE STATEMENT OF MATERIAL FACTS IN DISPUTE

STURGILL EXHIBIT #29

DARIO BELL
Director of Corporate Safety
250 E. Park Center
Boise, Idaho 83702

Dec. 18, 1992

(RE) D.O.T. Files "Request for All D.O.T. Records & Report Facts:

- Employed Aug. 20, 1990 as Driver - Passed All Required Medical - Driving - PRC: Employment Tests.
- No Tickets - Accidents or Reprimands while Employed:
- On Job Injury Dec. 3, 1991 - Released without restriction Nov. 3, 1992. From Albertson's Recommended Doctor's.
- Was required to go to another "Albertson's Doctor. Nov. "Note" "Eubanks Clinic in Gresham, OR have given me 3 DOT physicals." Was sent to Another "Eubanks" Clinic" Dr. said you need "vision waiver." I explained vision had not changed in 54 years except for bifocals.
- Frank Riddle - Ted Sturgil told me on Nov. 6, 199_ Vision Waiver was to be "Corporate Decision" - Ted Sturgil called Fri. Nov. 20, 1992 4:35PM said No Waiver to be Accepted. Ask for Paperwork and he said none would be sent.
- Charlie "Personnel" Director 8252 was sent notice for Records - Reports - Notes, Etc. "Received Nothing"
- Called Director of Labor Relation in Boise. He said he would look into problem. And call me back by Wed. Nov. 25. Have not been called back.
- Local 305 sent letter to Bruce on Nov. 30, 1992. Asking for reinstatement. - No Response this date.
- Request release of information in all D.O.T. Files -

Medical Reports - Any and all Notes - Memos - FAX
concerning Author of this Letter.

Sincerely,

s/ Hallie Kirkingburg

Hallie Kirkingburg
4780 Juno Hill
Tillamook, OR 97141

copy sent to:
Linda Taylor
Federal Programs Manager
U.S. Dept. of Transportation
Koin Center, Suite 600
222 SW Columbia St.
Portland, OR 97201

STURGILL EXHIBIT #32

Albertson's Inc. December 28, 1992
17505 NE San Rafael St.
Box 30779
Portland, OR 97230

Transportation and/or Personnel Manager:

RE: D.O.T. Request for Information:

Per "Eubanks Clinic" Statement that I needed a "Vision Waiver." I submitted a Application on Nov. 12 1992, (Before the Termination phone call on Nov. 20, 1992) to Department of Transportation, Vision Waiver Program. More information is needed to complete that application. This must be supplied by "Albertsons" on their stationary. A time Limit of 30 Days from the date I received the D.O.T. is required, Dec. 28, 1992 is the date I received their letter. I am requesting copies of any information sent to D.O.T. for my files. Please review the enclosed letters carefully.

Sincerely:

s/ Hallie Kirkingburg

Hallie Kirkingburg
4780 Juno Hill
Tillamook, OR 97141

cc: Linda Taylor
Federal Programs Manager
US D.O.T.
222 SW Columbia St.
Portland, OR 97201

STURGILL EXHIBIT #32 CONT.

U.S. Department
of Transportation

400 Seventh St. S.W.
Washington, D.C. 20590

Federal Highway
Administration

Dear Applicant:

We have reviewed your application for waiver of the Federal Highway Administration's vision requirements for drivers of commercial motor vehicles operated in interstate commerce. We are unable to determine whether you meet the conditions as outlined in the recent Federal Register notices. Some of the required information was not provided with your application.

We have provided you with a list identifying the additional information needed to process your request for waiver. Please note that you need to obtain this information and send it as quickly as possible to:

Vision Waiver Program
400 7th Street, S.W.
Washington, D.C. 20590

The deadline for submitting this information is 30 days from the date you receive this notice. You may be assured that your resubmission will be handled quickly.

Please note that you have been assigned a control number. It appears near the top of the enclosed list. Please place this number on each document you submit. If the requested documentation is not received within 30 days upon receipt, not further action will be taken by this agency.

Thank you for your cooperation.

Sincerely,

s/

James E. Scapellato, Director
Office of Motor Carrier Standards

STURGILL EXHIBIT #32 CONT.

U.S. Department
of Transportation

400 Seventh St. S.W.
Washington, D.C. 20590

Federal Highway
Administration

**VISION WAIVER APPLICATION:
Request for Missing Information**

Your application is missing one or more items and/or specific information needs clarification. Please submit that information, as well as this letter, as soon as possible in order to expedite your application for the vision waiver. Please note your application number and write it on the top of each page you submit.

Application Number: 3369-Kirkingburg

December 21, 1992

Please submit the following information:

Employment Verification

I. If you are/were employed by another person/company and you currently possess a valid license to operate a CMV:

- Submit a signed, employer verification, on company stationary, that you have driven a CMV *for the 3 years immediately preceding the date of your application for this waiver.* This letter must certify that you drive CMV's for this company, the date you began driving CMV's, and whether or not you are still employed driving CMV's. If you are not currently driving CMV's for this company due to your visual deficiency, your employer must specify this.

Since you have been leased to another company and you are not your own motor carrier, please provide employer verification.

Driver Record

- Submit a more recent motor vehicle report (the one you submitted was dated in March). Please make sure that this is an official State issued report and that it also *covers the entire employer verified 3 year period of CMV operation up to the present.*

If there are any violations or accidents on your record:

- Submit official documentation that distinguishes the type of vehicle operated (personal vehicle or CMV) when each violation listed on your MVR occurred.
- Submit a copy of the accident report for each accident shown on your MVR. If you were operating a commercial vehicle and were issued a citation, and there was property damage involved, you must provide official documentation as the dollar amount of that damage.

STURGILL EXHIBIT #34

Albertsons

January 15, 1993

Hallie Kirkingburg
4780 Juno Hill
Tillamook, OR 97141

Dear Mr. Kirkingburg:

This is in reply to your December 18, 1992 letter to Dario Bell and is in follow-up to our recent telephone conversation.

We have reviewed your work history with Albertson's during the past 2 years. We appreciate your consistent job performance. We very much regret that you are unable to continue your employment with Albertson's as a driver because of your vision.

The Department of Transportation Regulations, which set forth the eligibility requirements of drivers, provides:

- A person shall not drive a motor vehicle unless he is physically qualified to do so and, except as provided in §391.67, has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle. A person is physically qualified to drive a motor vehicle if that person ... has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize

the colors of traffic signals and devices showing standard red, green, and amber." §391.41(a) and (b)(10)

Dr. Douglas Eubanks advised our Transportation Department on November 6, 1992 that the vision acuity of your left eye cannot be corrected to better than 20/200. You were disqualified from driving pursuant to the DOT Regulations, because of Dr. Eubanks' finding.

We genuinely hope that your vision acuity is corrected in the future so that you may qualify to drive. I have enclosed a copy of the report of Dr. Eubanks for your reference.

If you need additional information or if you have any questions, please do not hesitate to call me collect at 208/385-6385.

Sincerely,

s/ Bruce Paolini

Bruce Paolini
Vice President, Labor Relations
Labor Relations Department

BPP/Inc/1152

Enclosure

cc: Frank Riddle

Scott Jardine

Charlie Norris

ALBERTSON'S INC/GENERAL OFFICES/250
PARKCENTER BLVD/BOX 20/BOISE, IDAHO 83726
208-385-6200

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STURGILL EXHIBIT #35

TO Bruce AT _____
FROM Scott DATE 1/29/93
SUBJECT Attached WHEN NEEDED Taken _____

- ☐ For Your Information
☒ Please Handle As Req.
☐ What Action Has Been
☐ Note & Return With Comments
☐ Please Take Up With Me
☐ Per Phone Conversation
☐ For Your Approval

This is the driver with the vision problem in Portland.
Call if I can be of help.

Scott

REPLY

Albertsons

AVOID ORAL INSTRUCTIONS

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STURGILL EXHIBIT #35 CONT.

**LAW OFFICES OF
PETER O. HANSEN**
1020 SW TAYLOR ST., SUITE 700
PORTLAND, OREGON 97205-2512
(503) 228-6040 FACSIMILE (503) 226-0457

1134 MAIN STREET
P.O. BOX 415
TILLAMOOK, OREGON 97141
(503) 842-8772 FACSIMILE (503) 842-8821

January 21, 1993

Dario Bell
Director of Corporate Safety
250 E. Park Center
Boise, ID 83702

RE: HALLIE KIRKINGBURG, Claimant

Dear Mr. Bell:

This office has been retained to represent Claimant regarding his workers' compensation claim. Please provide our office with copies of the following documents:

(1) D.O.T. files

I have enclosed a previous request from our client along with a copy of our information release.

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If you have any questions, please do not hesitate to contact our office.

Very truly yours,

s/ Wanda Pickett

Wanda M. Pickett for
MARILYN K. JONES, Legal Assistant

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STURGILL EXHIBIT #36

U.S. Department
of Transportation

400 Seventh St. SW
Washington, D.C. 20590

Federal Highway
Administration

No. V3369

February 25, 1993

Mr. Hallie Kirkingburg
4780 Juno Hill
Tillamook, OR 97141

Dear Mr. Kirkingburg:

Your application for a waiver from the vision requirements of 49 CFR 391.41 (b)(10) has been approved. The waiver authorizes you to operate a Commercial Motor Vehicle (CMV) in interstate commerce.

Your waiver is enclosed. Please carry it with you at all times while driving a CMV.

Please read the waiver and note the conditions required of you to retain your waiver status. Pay particular attention to the conditions set forth on the reverse side of the waiver. These are reporting requirements you must fulfill to keep your waiver. The reports should be mailed to:

Vision Waiver Program
400 Seventh Street, SW
Washington, D.C. 20590

If you have any questions about your waiver, please write to the address above.

Sincerely yours,

s/ Thomas P. Kozlowski

Thomas P. Kozlowski, Acting Director
Office of Motor Carrier Standards

STURGILL EXHIBIT #37

FEDERAL HIGHWAY ADMINISTRATION

VISION WAIVER

[From the requirements of 49 CFR 391.41(b)(10)]

Name: Mr. Hallie Kirkingburg **Waiver Number:** V3369

SSN: 270-34-2921 **DOB:** 05-21-38

Address: 4780 Juno Hill **Effective Date:** 02-25-93
Tillamook, OR 97141

Expiration Date: 02-25-96

Driver's License Number and State of Issuance:
3261558 OR

AUTHORITY: 49 U.S.C. App. 2505 (f)

THIS WAIVER DOCUMENT MUST BE CARRIED BY THE INDIVIDUAL TO WHOM IT HAS BEEN ISSUED WHILE OPERATING A COMMERCIAL MOTOR VEHICLE (CMV) AND PRESENTED UPON THE REQUEST OF ANY LEGALLY AUTHORIZED ENFORCEMENT OFFICIAL.

This waiver authorizes the above named individual to operate a CMV in interstate commerce under the conditions set forth below. This waiver is subject to periodic review by the Federal Highway Administration. Any failure to comply with the conditions of the waiver stated below will be cause for immediate revocation of this authorization.

CONDITIONS: Each individual shall:

(1) Be medically examined and certified in accordance with 49 CFR 391.43 as physically qualified to operate a CMV, except for the vision requirement being waived by this document;

(2) Obtain a medical examiner's certificate, from a health care professional, that bears the statement "**Medically unqualified unless accompanied by a Federal vision waiver;**"

(3) Provide the medical examiner's certificate upon request of any legally authorized enforcement official; and

(4) Obtain and display the appropriate driver's license from your State of domicile and comply with any restrictions placed thereon regarding required use of eyeglasses, mirrors or other visual aids.

Issued by:

s/ Thomas R. Kozlowski
(for) E. Dean Carlson
Executive Director
Federal Highway Administration

DRIVER HISTORY: Each individual shall, for the three years prior to the effective date of this waiver:

(1) Have no suspensions or revocations of a driver's license for the operation of any vehicle;

(2) Have no involvement in a reportable (49 CFR 394.3) accident in which a citation was issued for a moving traffic violation;

(3) Have no convictions for a disqualifying offense or more than one conviction for serious traffic violations while driving a commercial motor vehicle during the three-year period, which disqualified or should have disqualified that individual under the provision of 49 CFR 383.51; and

(4) Have no more than two convictions for any other moving traffic violations while operating a commercial motor vehicle.

REPORTING REQUIREMENTS: There are six reporting requirements which must be met in full during the term of this waiver. Each driver is required to:

(1) Report any citation for a moving violation involving the operation of a CMV within 15 days following the issuance;

(2) Report the judicial/administrative disposition of such charge within **15 days** following notice of disposition;

(3) Report any accident involvement whatsoever while operating a CMV within **15 days** following the accident (include Federal, State, insurance company, and/or motor carrier accident reports);

(4) Submit documentation of an annual examination by an ophthalmologist or an optometrist at least **15 days** before the annual anniversary of the effective date of the waiver. The documentation must contain the medical specialist's certification that the individual is still eligible under the waiver's vision criteria and the vision deficiency has not worsened since the last vision examination required by this waiver; and

(5) Report by the 15th calendar day of each month: (not including the month in which this waiver becomes effective)

- (a) The number of miles driving a CMV during the preceding month;
- (b) The number of daylight hours and the number of nighttime hours driving a CMV during the preceding month; and
- (c) The number of days you did not operate a CMV during the preceding month.

This report must be submitted each month even if a CMV was not operated during that period.

(6) Report immediately all changes concerning: address, telephone, employment and type of vehicle driven.

All documentation described in items (1) through (6) above, must be mailed to:

**Vision Waiver Program, 400 7th Street SW, Washington,
D.C. 20590**

**FAILURE TO SUBMIT TIMELY REPORTS WILL BE
CAUSE FOR CANCELLATION OF THIS WAIVER.**

STURGILL EXHIBIT #39

***Dairy, Bakery & Food Processors, Industrial,
Technical & Automotive, Local Union No. 305***

Affiliated with The International Brotherhood of Teamsters
1870 N.E. 162nd Avenue • PHONE (503) 251-2305
• FAX (503) 251-2301
PORTLAND, OREGON 97230

FAX TRANSMITTAL
TEAMSTER LOCAL UNION NO. 305
FAX NO. 251-2301

DATE 3-11-93
TO Bruce Paolini
Labor Relations

FROM Roy Dwiggin
305

NO. OF PAGES 5 (INCLUDING THIS
TRANSMITTAL)

COMMENTS

What is his status?

(***Transmitted pages omitted in printing here -- printed earlier in full - Sturgill Exhibits 34, 36 and 37 respectively)

STURGILL EXHIBIT #40

*Dairy, Bakery & Food Processors, Industrial,
Technical & Automotive, Local Union No. 305*

Affiliated with The International Brotherhood of Teamsters
1870 N.E. 162nd Avenue • PHONE (503) 251-2305
• FAX (503) 251-2301
PORTLAND, OREGON 97230

March 19, 1993

Bruce Paolini
Vice President
Labor Relations Dept.
Albertsons, Inc.
Box 20
Boise, Idaho 83726

RE: Halli Kirkenburg

Dear Bruce;

Please be advised that we are disputing the fact that your Company refused to return Mr. Kirkenburg to work following his submitting proof of compliance with D.O.T. requirement for vision.

We are requesting that Mr. Kirkenburg be reimbursed for all monies lost since March 11, 1993. This is the date that you received the FAX from this office containing Mr. Kirkenburg's vision waiver.

Please respond immediately to this matter.

Sincerely,

s/ Roy Dwiggin
Roy A. Dwiggin
Business Representative

STURGIL EXHIBIT #41

Albertsons

May 17, 1993

Roy Dwiggin
Business Representative
Teamsters Local 305
1870 N.E. 162nd Avenue
Portland, OR 97230

RE: H. Kirkingburg

Dear Mr. Dwiggin:

I am writing to you regarding the grievance filed by Mr. Kirkingburg. As a compromise, on a non-admission and non-precedent setting basis, the company is willing to offer Mr. Kirkingburg employment as a yard hostler. If Mr. Kirkingburg is interested, he should contact Mr. Frank Riddle at the Portland Distribution Center.

Very truly yours,

s/ Dona
Dona Adams Pike
Labor Relations Manager
Labor Relations Department

DAP:ej

cc: Frank Riddle

STURGILL EXHIBIT #43

Albertsons

TO: All Transportation Managers
FROM: Scott Jardine - Corporate Director of Transportation
DATE: June 4, 1993
SUBJECT: Driver Qualifications

Albertson's owes it to its customers, employees and the public to have the safest possible driver workforce.

Part 391 of the Federal Motor Carrier Safety Regulations addresses minimum qualifications of drivers as follows:

"The rules in this Part establish minimum qualifications for persons who drive motor vehicles as, for, or on behalf of motor carriers,..."

Recently, the DOT has issued waivers which allow drivers who cannot meet the minimum qualifications of the DOT to operate motor vehicles. DOT waivers mean drivers who cannot meet DOT minimum standards are on the road.

We should continue to apply the minimum standards of the DOT to applicants and employees. In situations where reasonable accommodations to a driver with a disability are legally required, our priority is to accommodate the driver in ways other than a DOT minimum qualification waiver.

If you have questions about our duty to reasonably accommodate individuals with a disability, please contact Dona Adams Pike at 208-385-6391. If you have questions about this memo, please call me.

Scott
s/ Scott

cc: Tom Brother
Mike McCarthy
General Managers/Directors
Bruce Paolini
Dona Adams Pike

STURGILL EXHIBIT #47

OVERNIGHT

Albertsons

August 23, 1993

Don Alcock
Oregon Bureau of Labor & Industries
800 N.E. Oregon Street, #32
Portland, OR 97232

RE: HALLIE KIRKINGBURG

Dear Mr. Alcock:

I am writing in response to the charge of discrimination filed by Mr. Kirkingburg with the Equal Employment Opportunity Commission and the Bureau of Labor and Industries alleging employment discrimination on the basis of disability.

Albertson's adamantly denies that it discriminated against Mr. Kirkingburg on the basis of his disability or any other basis prohibited by law. Albertson's affirmatively states that it offered employment to Mr. Kirkingburg for which he was qualified, but he declined to accept the positions offered.

Mr. Kirkingburg began his employment with Albertsons' Portland Distribution Center as a Driver on August 21, 1990. In his charge, Mr. Kirkingburg alleges that he suffered a compensable injury on December 3, 1991, and was released to return to work on November 3, 1992. He also alleges that Albertson's refused to reinstate him and demanded that he report for a new physical. These facts are not in dispute. Drivers at the Portland Distribution Center are required to be Department of Transportation (DOT) certified. It is common practice to refer workers who have been off work for such a

lengthy period of time for a DOT physical. A copy of Part 391 of the Federal Motor Carrier Safety Regulations is enclosed for your information.

In order to meet DOT vision requirements, Drivers must have a distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses; distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses; field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

When Mr. Kirkingburg was released to return to work, in keeping with DOT requirements, he was referred to Dr. Eubanks for a DOT physical. Based on the DOT physical, Mr. Kirkingburg did not meet the minimum visual requirements for DOT certified drivers. In fact, according to Mr. Kirkingburg's DOT physical examinations, his vision has deteriorated substantially. Contrary to his statement in the charge that his vision has not changed. On August 18, 1990, Mr. Kirkingburg's visual acuity was 20/20 in his right eye and 20/70 in his left eye, with a binocular acuity for both eyes of 20/25. On November 6, 1992, Mr. Kirkingburg's visual acuity was 20/20 in his right eye and 20/200 in his left eye. Thus, Mr. Kirkingburg's vision in his right eye had deteriorated to the point that neither his separate distant visual acuity or his corrected binocular visual acuity met DOT standards. Based upon the results of the November, 1992, medical examination, Albertson's refused to reinstate Mr. Kirkingburg as a Driver. Copies of the physicals are enclosed.

Recently, DOT implemented a pilot program to study drivers with vision problems compared with drivers who meet DOT minimum vision requirements in anticipation of possible

modification of DOT requirements. Under this program, waivers are available to drivers who meet certain standards. A copy of the regulations regarding the pilot program is enclosed for your information.

Dr. Eubanks, the doctor who performed the DOT physical, advised Mr. Kirkingburg that he may be able to obtain a DOT waiver. Mr. Kirkingburg did, in fact, apply for and receive a DOT vision waiver. Mr. Kirkingburg did not receive and transmit the DOT waiver to Albertson's until February 23, 1993. Albertson's declined to accept the DOT vision waiver because of concerns regarding safety, but offered to employ Mr. Kirkingburg in two separate positions for which we deemed him to be qualified. The first position was a Yard Hostler. The second position was working in the shop. Mr. Kirkingburg declined to accept either of these positions.

Mr. Kirkingburg alleges that he was terminated in November, 1992. This is not true. Mr. Kirkingburg was only terminated after he declined to accept either of the positions which were offered to him as an accommodation to his disability.

Albertson's does not employ drivers who do not meet minimum DOT requirements. The fact that Mr. Kirkingburg applied for and received a waiver of the DOT vision requirements, does not mean that he meets the minimum qualifications of a DOT driver. Rather, it means that based upon his driving record and the fact that he has acceptable vision in one eye, DOT will allow him to drive so that he may participate in their study. Albertson's has not and will not accept DOT vision waivers because of safety considerations. In the alternative, Albertson's may offer to employ incumbent drivers who do not meet the minimum DOT requirements, in available positions, for which they are qualified, as an accommodation to their disability.

The Americans with Disabilities Act does not require companies to employ individuals who are not "otherwise qualified." The Act requires employers to make reasonable accommodation to the disabilities of individuals, but allows the employer to select the accommodation. In this case, Mr. Kirkingburg was offered reinstatement in two position with comparable pay and comparable hours. Certainly, the Company met its legal obligation to reasonably accommodate Mr. Kirkingburg's disability by offering him alternative positions. Mr. Kirkingburg does not have the right to choose the accommodation. By declining the reasonable accommodation, he in effect voluntarily terminated his employment.

If you wish to interview any Albertson's employees, please advise so that I may make the arrangements. I wish to be present during all interviews. Also, if you require additional information, please direct the request to me.

Because the evidence is undisputed that Mr. Kirkingburg no longer meets DOT minimum requirements and because Mr. Kirkingburg has declined the reasonable accommodations offered to him, this charge should be dismissed.

Very truly yours,

s/ Dona Adams Pike

Dona Adams Pike
Labor Relations Manager
Labor Relations Department

Enc.
cc: Frank Riddle
Ted Sturgill

STURGILL EXHIBIT #48

FAX AND REGULAR
MAIL

Albertsons

February 28, 1994

Irene Zentner
Senior Investigator
Bureau of Labor and Industries
800 NE Oregon St. #32
Portland, OR 97232

RE: Kirkingburg vs. Albertson's, Inc.
Case # ST-EM-DP-930611-2338

Dear Ms. Zentner:

I am writing to confirm our earlier telephone conversation regarding the above-captioned matter.

In earlier correspondence, you requested information regarding the positions which were offered to Mr. Kirkingburg after he received notification of his termination, including the dates the positions were offered, salaries, duties, minimum qualifications and his responses as well as identification of any other positions which became vacant between November 20, 1992 and May 17, 1993 for which he was qualified.

Regarding the positions which were offered to Mr. Kirkingburg, the position of Yard Hostler was offered on May 17, 1993 by letter addressed to Roy Dwiggin, Business Agent for Local 305. A copy of the letter is enclosed. The salary is the same as the Driver's salary. The duties include moving

trailers and generally involve the same duties as Drivers, however, Yard Hostlers usually work in the yard as opposed to on the highway. When the position of Yard Hostler was offered, Mr. Kirkingburg did not immediately accept it, and although the Company had intended to restrict Mr. Kirkingburg to driving in the yard only, we became concerned because the position does require DOT certification. Accordingly, the offer of this position was withdrawn.

The second position which Mr. Kirkingburg was offered was the position of Tire Mechanic. This position was offered to Mr. Kirkingburg by telephone by Charles Norris, Personnel Manager at the Portland Distribution Center. Mr. Norris advises that this conversation took place sometime between May 7, 1993, when the position came open and June 21, 1993 when the position was filled. The driver's salary was \$14.21 per hour. Tire Mechanic's salary is \$13.05 per hour. Mr. Norris did not discuss with Mr. Kirkingburg what the salary would be as Mr. Kirkingburg immediately rejected the position and indicated that he did not want to take any position other than a driving position. The duties of a tire mechanic are to maintain and track tire usage on all equipment, change tires, order tires under the supervision of the Superintendent. It does require that the employee be able to lift tires in some cases and it does require that the employee have a valid driver's license because it sometimes necessary to travel to the equipment for repair. DOT certification and a commercial license are not required. Mr. Kirkingburg rejected this job offer in the telephone conversation stating "Hell no, I want to be a driver. I'm not a damn tire mechanic." Mr. Norris is available to sit for an interview at your convenience.

Regarding the positions open between November 20, 1992 and May 17, 1993, I am obtaining that information and should be able to provide it to you this week.

Very truly yours,

s/ Dona Adams Pike

Dona Adams Pike
Labor Relations Manager
Labor Relations Department

DAP:slt
Enclosure

6

Supreme Court, U. S.

FILED

FEB 22 1999

CLERK

No. 98-591

In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

Corbett Gordon
Counsel of Record
Heidi Guettler
Richard R. Meneghello
Kelliss Collins
Corbett Gordon & Associates, P.C.
1001 SW 5th Avenue, Suite 1600
Portland, Oregon 97204
(503) 242-4262
Counsel for Petitioner

5918

QUESTIONS PRESENTED

1. Whether a monocular individual is "disabled" under the Americans with Disabilities Act ("ADA").
 - a) Whether a monocular individual is, per se, substantially limited in the major life activities of working and seeing under the ADA.
 - b) Whether a remark that a monocular driver is blind in one eye supports a claim that an employer regards that individual as disabled under the ADA.
2. Whether a monocular driver of a commercial motor vehicle is "qualified" when he does not meet a business related standard set by the employer.
3. Whether an employer must adopt an experimental vision waiver program as a means of "reasonable accommodation."

List of Parties

The parties before the Court, and the parties to the proceeding below are identical.

Corbett Gordon Attorneys for Albertsons, Inc.
Heidi Guettler
Richard R. Meneghello
Kelliss Collins
Corbett Gordon & Associates, P.C.
1001 S.W. 5th Avenue, Suite 1600
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Busse & Hunt
621 S.W. Morrison, Suite 521
Portland, Oregon 97205
(503) 248-0504

Rule 29.1 Listing

Albertsons has no parent companies or nonwholly owned subsidiaries to list.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-591

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (J.A. 220) is reported at 143 F.3d 1228 (1998). By order entered July 8, 1998, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc (J.A. 267). The opinions of the district court (J.A. 115-122, 127-129) are unreported.

JURISDICTION

On May 11, 1998, the United States Court of Appeals for the Ninth Circuit entered its order and opinion in this case. On July 1, 1998, the United States Court of Appeals for the Ninth Circuit entered its order and amended opinion in

this case. The United States Court of Appeals for the Ninth Circuit entered its order denying the petition for rehearing of Albertsons, Inc., and the suggestion for rehearing en banc on July 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant Statutes, in Pertinent Part

42 U.S.C. § 12102(2)

(2) Disability

The term "disability" means, with respect to an individual--

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of that individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12112(a)

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and

other terms, conditions, and privileges of employment.

42 U.S.C. § 12111(8)

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12113(a),(b)

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such

performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12111(3)

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

Relevant DOT Regulations, in Pertinent Part

49 C.F.R. § 391.41(b)(10)

(b) A person is qualified to drive a commercial motor vehicle if that person--

- (10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40(Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or

without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

49 C.F.R. § 390.3(d)

- (d) Nothing in [49 C.F.R. §§350-399] shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health.

STATEMENT OF THE CASE

Facts

Since 1939, the United States has enforced safety standards for commercial truck drivers who operate motor vehicles on the country's highways. These standards have always required drivers to have good eyesight. The minimum visual acuity standard was set at 20/40 in each eye in 1970 and remains unchanged to this day. Qualification of Drivers, 63 Fed. Reg. 41769, 41770 (1998) (to be codified at 49 C.F.R. Pt. 391) (proposed Aug. 5, 1998).

Albertsons, a grocery chain, dispatches truck drivers from large warehouses via interstate commerce to its retail stores. Because of safety and liability concerns, Albertsons has always required its truck drivers to meet the minimum DOT vision acuity standard of 20/40 in each eye. 49 C.F.R. §§ 391.41 - 391.49. The Company has never knowingly relaxed its policy (J.A. 53, 55).

On August 21, 1990, Albertsons, Inc. ("Albertsons" or "the Company") hired Hallie Kirkingburg as a truck driver at the Portland, Oregon Distribution Center -- a large warehouse from which grocery product is dispatched by trucks to Albertsons' retail grocery stores in three states (J.A. 49, 331).

The Department of Transportation's ("DOT") Motor Carrier Safety Regulations require that all over-the-road truck drivers be physically qualified to drive. Qualification includes vision standards with a minimum acuity score of 20/40 corrected in each eye. Albertsons requires all drivers to meet the minimum DOT vision standards.

Kirkingburg claims he was born with vision in his left eye of 20/200 that has not changed (J.A. 12, 35). The reduced acuity in his left eye is due to amblyopia, a condition marked by low or reduced visual acuity (J.A. 35). The condition is not correctable by eyeglasses or contact lenses (J.A. 35) and causes loss of peripheral vision and depth perception.¹

Despite his amblyopia, Kirkingburg worked steadily before his employment with Albertsons. He worked on and off as a truck driver from 1974-1990, and drove a truck as a garbage hauler from approximately 1981 through 1989. He worked as an auto mechanic from approximately 1968 through 1979. Before that, Kirkingburg worked as a jet aircraft mechanic and, later, crew chief to a basic air commander in the U.S. Air Force from approximately 1957 through 1960 (J.A. 11, 137-138, 287-288).

Before Kirkingburg was employed by Albertsons, the DOT certified clinic to which the Company sends applicants

¹ R.V. North, *The Relationship Between the Extent of Visual Field and Driving Performance - A Review*, 5 Ophthalmic Physiol. Opt. No. 2 at 205, 209 (1985).

and employees for medical evaluation erroneously certified him (J.A. 360). On August 18, 1990, an examination revealed that he had acuity ratings, corrected with eyeglasses, of 20/25 in the right eye and 20/70 (a failing grade) in the left eye (J.A. 360). That medical examiner incorrectly certified that Kirkingburg met the DOT minimum safety requirements. A second examination, on February 5, 1991, while he was an employee revealed that Kirkingburg had acuity ratings, corrected with eyeglasses, of 20/25 in the right eye and 20/100 (a failing grade) in the left eye (J.A. 361). That medical examiner also incorrectly certified that Kirkingburg met the requirements under the Motor Carrier Safety Regulations. Albertsons has historically deferred to the medical reports provided by a DOT certified clinic having no prior reason to believe that the examination results were inaccurate (J.A. 56).

On December 3, 1991, Kirkingburg sustained an on-the-job injury when he fell from the cab of his truck (J.A. 5, 274). Kirkingburg was released to return to work in November of 1992 (J.A. 12-13). In accordance with company policy, Albertsons required Kirkingburg to be DOT recertified before returning to work from the long-term injury (J.A. 350).

On November 6, 1992, Kirkingburg was correctly found to have an acuity rating of 20/20, corrected, in the right eye and 20/200 (a failing grade) in the left eye (J.A. 357). The medical examiner advised Albertsons' Transportation Department that Kirkingburg failed to meet the vision requirements under DOT minimum safety standards and could not be certified (J.A. 341-342, 357).

Despite not having the requisite DOT certificate, Kirkingburg asked to return to work as a driver (J.A. 18). Frank Riddle, General Manager of the Distribution Center, reviewed Kirkingburg's DOT file and confirmed that

Kirkingburg's visual acuity failed to meet DOT minimum safety requirements (J.A. 314). Additionally, Kirkingburg failed to meet the requirements set forth in Albertsons' Driver Manual, which states in pertinent part, "[a]s an Albertson's driver, you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." (J.A. 332-333).

On November 20, 1992, Kirkingburg was terminated from Albertsons as he was not qualified for the position of truck driver because he did not meet the minimum DOT safety requirements (J.A. 365-366). In fact, Kirkingburg was never qualified and should never have been allowed to drive for Albertsons at all because he had never met the vision requirements set forth in 49 C.F.R. § 391.41(a) and (b)(10)). In the context of discussing what it was about Kirkingburg's vision that caused the Company concern, Riddle noted that Kirkingburg was "legally blind, or blind in one eye." (J.A. 341).

While Albertsons did not believe Kirkingburg was qualified to drive a commercial vehicle, it considered him for and offered him two other jobs (J.A. 53). Albertsons offered Kirkingburg the position of Yard Hostler, moving trailers at the Distribution Center. After Albertsons made the Yard Hostler offer, but before he responded, the Company realized that the position also required DOT certification, and withdrew that offer (J.A. 345, 395). The Company also offered Kirkingburg the position of Tire Mechanic, changing and repairing truck tires (J.A. 53). Kirkingburg refused the Tire Mechanic position (J.A. 53).² Shortly after being

² Albertsons also encouraged Kirkingburg to apply for a position in the warehouse (J.A. 54-55).

terminated, Kirkingburg secured employment as a truck driver with Pestega Trucking (J.A. 282).

In July 1992, the Federal Highway Administration ("FHWA") commenced an experimental vision waiver study program. Qualification of Drivers, 57 Fed. Reg. 31458 (1992). This program granted experimental waivers to drivers who failed to meet the minimum visual acuity standards set forth in the DOT regulations. *Id.* The FHWA's stated purpose of the experimental waiver study program was to "provide objective data to be considered in relation to a rulemaking exploring the feasibility of relaxing the current absolute vision standards in 49 C.F.R. Pt. 391 in favor of a more individualized standard." Qualification of Drivers, 57 Fed. Reg. 10295 (1992). The experimental study was undertaken to test the "efficacy" of the regulatory vision requirements. Qualification of Drivers, 57 Fed. Reg. 31458, 31459 (1992).

The standards for participating in the experimental vision waiver program were that applicants: (a) had a license to operate a commercial motor vehicle; (b) had three years' minimum experience driving a commercial vehicle; (c) during that three year period, the applicant operated a commercial vehicle without certain moving violation citations, license suspension, or driving-related convictions; and (d) were examined by an optometrist or ophthalmologist who performed certain tests and reported that the applicant was "able to perform the driving tasks required to operate a commercial motor vehicle." Qualification of Drivers, 57 Fed. Reg. 31458, 31460 (1992).³

³ In certifying that Kirkingburg met the vision requirements, his optometrist relied on information in a treatise and never made specific inquiry about Kirkingburg's driving conditions. She failed to consider factors that affect a monocular driver such as low light, shadows, and

The DOT has never required employers to accept experimental vision waivers. Albertsons' consistent policy is to employ only those drivers who meet or exceed the standard minimum DOT safety regulations, and not to accept DOT experimental waivers for vision (J.A. 53, 55). Albertsons made the business decision not to accept experimental waivers because of its concern for the safe operation of its vehicles (J.A. 330). The DOT standard minimum safety requirements for vision remain unchanged and have not been affected by the experimental waiver program.

Kirkingburg requested that the Company assist him in obtaining an experimental waiver (J.A. 369). Albertsons did not (J.A. 145). Kirkingburg obtained an experimental vision waiver from the DOT and, on February 2, 1993, requested to drive a truck for Albertsons (J.A. 145). Albertsons did not rehire Kirkingburg as a truck driver because it did not accept experimental vision waivers.⁴

Proceedings Below

Kirkingburg filed a complaint in the United States District Court for the District of Oregon alleging that Albertsons violated the Americans with Disabilities Act, 42

other specific driving conditions (J.A. 302-306).

⁴ On August 2, 1994, the experimental vision waiver program was invalidated by the Court of Appeals for the District of Columbia in *Advocates for Highway Safety v. Federal Highway Administration*, 28 F.3d 1288, 1294 (CA DC 1994). The court found the FHWA adopted the experimental waiver program contrary to law because it failed to determine that an experimental waiver was consistent with the safe operation of commercial motor vehicles. *Id.*

U.S.C. § 12101, *et seq.* ("ADA"), by failing to accommodate him by: 1) not waiting a reasonable time to allow Kirkingburg to obtain an experimental vision waiver; 2) not allowing plaintiff to return to work once he received the experimental waiver; and 3) not reassigning him to other suitable work. The jurisdiction of the District Court was invoked under the ADA, 42 U.S.C. § 12101, *et seq.*, and under 28 U.S.C. § 1331 (J.A. 4-6).

Albertsons filed for summary judgment on the ground that Kirkingburg was not a qualified individual, with or without reasonable accommodation, under the ADA because he could not meet the DOT minimum safety vision standards (J.A. 39-48).

The District Court granted Albertsons' Motion for Summary Judgment, holding that: 1) Kirkingburg was not a qualified individual under the ADA because he could not perform the essential functions of the job; 2) a leave of absence to obtain an experimental vision waiver was not a reasonable accommodation, as such accommodation would be futile; 3) the ADA does not obligate Albertsons to employ truck drivers with experimental vision waivers; and 4) Albertsons may rely on the DOT vision standards and need not make an individual assessment of Kirkingburg's ability to drive (J.A. 115-122).

Kirkingburg filed a Motion for Reconsideration with the District Court on the ground that the court did not address whether one form of reasonable accommodation would have been to reassign Kirkingburg to a Yard Hostler position (or to another available and suitable position) (J.A. 123). The District Court denied Kirkingburg's Motion, stating that he failed to provide evidence that the Yard Hostler position was available when he was terminated and that since driving was an essential part of that position, this accommodation would be futile (J.A. 127-128).

Kirkingburg appealed to the United States Court of Appeals for the Ninth Circuit (J.A. 130). By a two to one vote, the Ninth Circuit reversed the District Court's decision and remanded the case for trial. The Ninth Circuit held: 1) Kirkingburg was disabled under the ADA and its implementing regulations, if the facts were as he alleged; 2) there was a genuine issue of material fact whether Albertsons regarded Kirkingburg as disabled; 3) Kirkingburg was a qualified individual under the ADA, because he established a genuine issue of material fact with respect to whether he could perform the essential functions of a commercial truck driver; 4) by refusing to accept the experimental waiver, Albertsons chose to adhere to only a portion of the federal regulations; 5) Albertsons was not free to disregard the experimental waiver program for the reason it asserted at the time of Kirkingburg's termination, because there was no evidence that Albertsons believed the experimental waiver program to be invalid; and 6) Albertsons failed to produce any evidence that Kirkingburg and other experimental waiver recipients posed a direct safety threat (J.A. 220-249).

The dissent stated: 1) Kirkingburg failed to show he could perform the essential functions of his job because he did not meet the minimum DOT vision requirements; 2) the ADA does not require Albertsons to accept an experimental waiver that the FHWA had not found to be consistent with the safe operation of commercial motor vehicles at the time of Kirkingburg's termination; and 3) since Albertsons offered to accommodate Kirkingburg's disability with the offer of another job, which Kirkingburg rejected, it fulfilled its ADA obligations (J.A. 249-254).

Albertsons filed a Petition for Rehearing and Suggestion for Rehearing En Banc (J.A. 255-266), which was denied on July 8, 1998 (J.A. 267).

Albertsons filed a Petition for a Writ of Certiorari on

October 6, 1998, seeking review of the Ninth Circuit's decision. The Court granted review on January 8, 1999.

SUMMARY OF ARGUMENT

The Ninth Circuit's approach in this case is fundamentally at odds with the language and the purpose of the ADA in two respects: 1) under the Ninth Circuit's reasoning, all vision impaired individuals are disabled because they see in a "different" manner; and 2) under the Ninth Circuit's reasoning, the judgment of the court or jury is substituted for the business judgment of the employer in determining who is qualified.

Relevant History

- Since 1970, the DOT has maintained minimum visual safety standards at 20/40 corrected acuity in each eye.
- Albertsons has never considered any truck driver who cannot meet the DOT minimum safety standards to be qualified to drive a truck for the Company.
- The DOT instituted an experimental vision waiver program in 1992, that permitted certain individuals without 20/40 acuity in each eye to obtain a vision waiver.
- Albertsons discovered Kirkingburg had 20/200 uncorrectable vision in his left eye, and terminated him from a truck driver position.
- Kirkingburg obtained a vision waiver pursuant to an experimental program that allowed certain visually impaired individuals to be provisionally certified.
- Despite the experimental waiver, his vision still fell far short of the minimum DOT safety standards.
- Kirkingburg claimed the Company terminated him in

violation of the ADA, which prohibits discrimination against qualified individuals with a disability.

ADA Protections

- Kirkingburg is not entitled to ADA protection because he is neither "qualified" nor "disabled."

Qualified

- The ADA expressly recognizes that consideration shall be given to the employer's judgment in determining who is qualified. 42 U.S.C. § 12111(8).
- To be qualified, an individual must be able to perform the essential functions of the position with or without reasonable accommodation. An employer has the right to set any job-related standard consistent with business necessity. The ADA was not intended to second-guess an employer's business judgment.
- An essential function of Kirkingburg's position was driving a truck in interstate commerce.
- Kirkingburg failed to meet Albertsons' objective standard requiring all truck drivers to satisfy minimum vision standards set forth in 49 CFR § 391.41(b)(10). Thus, he is not "qualified" under the ADA.

Disabled

- The ADA defines "disability" as a physical impairment that substantially limits one or more of the major life activities of an individual.
- Kirkingburg claims that his monocular vision renders him disabled. He argues that he is substantially

limited in both "working" and "seeing."

working

- In order to be substantially limited in working, Kirkingburg must show he is significantly restricted from performing a broad range of jobs. To the contrary, his vision has never prevented him from doing any work he has wanted to do, other than driving a truck for Albertsons.
- Kirkingburg held numerous driving jobs before and after his termination. Thus, he is not precluded from a broad range of jobs.

seeing

- Kirkingburg's long and consistent job history demonstrates he is not substantially limited in the major life activity of seeing.
- The regulatory context for assessing the manner in which a person performs a life activity requires that the individual be "substantially restricted," not that his or her manner of seeing "differs substantially," the standard applied by the Ninth Circuit. The Ninth Circuit found that Kirkingburg was substantially limited in the major life activity of seeing because the manner in which someone with monocular vision sees is "different" than a person with binocular vision.
- The status of being "different," even substantially different, is not germane to an employment-related inquiry under Title I of the ADA.

Regarded as

- There is no genuine issue of material fact whether Albertsons regarded Kirkingburg as disabled.
- Albertsons regarded Kirkingburg as being able to work and see, since it offered him other job opportunities.
- The Company regarded him as not qualified for an essential function of a job as a truck driver.
- A comment by the General Manager that Kirkingburg was legally blind in one eye was not related to the decision to terminate his employment. Absent a causal link to the decision to terminate Kirkingburg's employment, this statement cannot support a claim that he was regarded as disabled.

Reasonable Accommodation

- The ADA examines whether an individual "can perform the essential functions of the employment position" under consideration. 42 U.S.C. § 12111(8). Because Kirkingburg was not qualified for the position of truck driver for the Company, it had no further duty under the ADA to accommodate him.
- The Ninth Circuit held that Albertsons should have accepted Kirkingburg's vision waiver as a reasonable accommodation and re-hired or reinstated him as a truck driver. This decision unfairly restricts a company's ability to set its own standards related to an essential function of the job, will have a chilling effect on national commerce, and should be reversed.
- No reasonable accommodation was required under the circumstances, but if this Court finds that Albertsons had an obligation to offer Kirkingburg some other

available and suitable job, it did so. When Kirkingburg rejected this offer, he lost protection of the ADA even under the broadest possible interpretation of the statute.

ARGUMENT

I. Kirkingburg Is Not Disabled.

The ADA states that no employer shall discriminate against a qualified individual with a disability because of the disability in regard to termination of employment. 42 U.S.C. § 12112(a). The ADA defines disability as a "physical . . . impairment that substantially limits one or more of the major life activities of that individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2).

While Kirkingburg may have a "physical impairment" due to his amblyopia, the Ninth Circuit erred when it ruled that Kirkingburg was substantially limited in the major life activities of working or seeing, and that Albertsons regarded him as having such an impairment.

A. Not substantially limited in a major life activity

The EEOC Regulations⁵ state that substantially

⁵ The ADA expressly directed the EEOC to draft regulations to carry out Title I (the employment discrimination provisions) of the ADA. 42 U.S.C. § 12116. This Court has said that "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

limited means that a person is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the . . . manner under which an individual can perform a major life activity" when compared with the average person. 29 C.F.R. § 1630.2(j)(1).

1. Not limited in the major life activity of working

The ADA does not define the term "major life activities," but the EEOC has characterized this term as encompassing "... those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. Pt. 1630, App. § 1630.2(i) (Interpretative Guidance)⁶. The EEOC Regulations provide a list of major life activities falling under this rubric, that includes "working." 29 C.F.R. § 1630.2(i). The EEOC Regulations list several factors to consider when determining if an individual is substantially limited with respect to the major life activity of "working." One factor to be considered is whether an individual is:

... significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in

843-844 (1984).

⁶ This Court has generally deferred to administrative interpretations. *Chevron* at 844. Specifically, with regard to EEOC interpretations, this Court has said, "... they do constitute the administrative interpretation of [a statute] by the enforcing agency, and consequently they are entitled to a great deference." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975), citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i).

a. Not precluded from a broad range of jobs

By simply asserting that he cannot drive a truck for Albertsons, Kirkingburg has not shown that he is precluded from a broad range of jobs in the geographic area where he lives, based on his inability to pass DOT minimum safety regulations.⁷

To the contrary, Kirkingburg held other jobs involving driving both before and after he worked for Albertsons.⁸ Apparently, none of those employers had the same minimum safety standards as Albertsons. This demonstrates that not being able to work for Albertsons as a truck driver is not the same as being substantially limited in

⁷ The EEOC has suggested that among the factors which may be considered in determining whether an individual is substantially limited in the major life activity of working are the number of jobs that the individual is disqualified from in the immediate geographic area because of the impairment, and the number of jobs still available despite the impairment. 29 C.F.R. § 1630.2(j)(3)(ii).

⁸ Kirkingburg worked as a truck driver from approximately 1974 through 1981, and again in 1990, and worked driving as an independent garbage hauler from approximately 1981 through 1989. After being terminated from Albertsons, he worked as a truck driver for Pestega Trucking.

the major life activity of working.

In the EEOC Compliance Manual⁹, the EEOC examines whether someone with a vision impairment is substantially limited in the major life activity of working. The EEOC provides examples about two different individuals with vision problems, concluding that one individual is substantially limited in the major life activity of working, while the other is not. EEOC Compliance Manual, §915.002, at pp. 902-24 - 902-25 (reissued Mar. 14, 1995).

In the first example, a computer programmer with a vision impairment cannot distinguish characters on the computer screen without accommodation. The impairment precludes her from working as a computer programmer, a systems analyst, a computer instructor, and a computer operator. Therefore, she is substantially limited in the major life activity of working because her impairment prevents her from working in the broad range of jobs requiring the use of a computer.

In the second example, a computer programmer with a vision impairment can distinguish characters on most computer screens. The impairment prevents her from distinguishing characters on a particular type of computer screen used by her employer. Since this impairment only prevents her from being a computer programmer for a particular employer, she is not substantially limited in the major life activity of working.¹⁰

⁹ This Court has previously drawn guidance from the views expressed by the EEOC published in its Compliance Manual. *Bragdon v. Abbott*, 524 U.S. 624, ___, 118 S.Ct. 2196, 2209 (1998).

¹⁰ The first example does not apply -- it would apply only if Kirkingburg were not able to see well enough to drive at all and was, therefore, unable to hold any job involving driving.

Kirkingburg's situation is analogous to the second example. Because Albertsons does not accept any experimental DOT waiver for vision and strictly applies the DOT minimum safety regulations, Kirkingburg is precluded from driving a truck for a particular employer -- Albertsons.

Therefore, Albertsons respectfully requests that this Court reject the reasoning of the Ninth Circuit and follow the guidance provided by the EEOC, adopted by several federal appellate courts¹¹ and hold that Kirkingburg is not substantially limited in the major life activity of working because he is not significantly restricted in his ability to perform a broad range of jobs.

2. Not limited in the major life activity of seeing

Another major life activity expressly enumerated by the EEOC is "seeing." 29 C.F.R. § 1630.2(i). Just as Kirkingburg is not substantially limited in the major life activity of working, an analysis of the 20/200 vision in his left eye and the activities he can perform should lead this Court to hold that he is not substantially limited in the major life activity of seeing.

a. Need to look at normal, daily activities that an individual can perform

Albertsons is not asking the Court to hold that

¹¹ See, for example, *Maulding v. Sullivan*, 961 F.2d 694, 698 (CA8 1992), *cert. denied*, 507 U.S. 910 (1993) (since impairment did not substantially limit plaintiff's employment ability as a whole, she was not substantially limited in working).

monocular individuals are never substantially limited in the major life activity of seeing. The EEOC's Interpretive Guidance correctly suggests that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(j) (Interpretative Guidance). By the same token, Albertsons respectfully requests that the Court reject any suggestion that it adopt a standard by which every monocular individual is held to be substantially limited per se, which is the effect of the Ninth Circuit's decision below.

Instead, this Court should examine the visual acuity of the individual involved to determine whether he or she can otherwise perform normal daily activities requiring eyesight. If the individual can perform these activities, despite having a vision impairment, this Court should hold that an individual is not substantially limited in the major life activity of seeing, even if restricted in his or her ability to perform an occasional specific task.

Several federal appellate courts have examined cases involving visually-impaired individuals and have determined that they are not substantially limited in the major life activity of seeing based on the above analysis.

For example, in *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 51 (CA5 1997), an individual who worked as a safety equipment clerk and as a warehouse clerk was blind in one eye. After he was terminated, he brought an ADA claim against his employer, claiming he was substantially limited in the major life activity of seeing. *Id.* The Fifth Circuit noted that the individual's remaining eye functioned at a normal level and that he was also able to perform normal daily activities (including driving) even though his monocular vision limited his peripheral vision. *Id.* at 52. Implicit in *Still* is the conclusion that the individual's vision impairment did not have a significant long term impact, since he could

engage in the same types of activities as an individual with normal sight.

In the instant case, Kirkingburg's monocular vision did not have a significant long term impact on his ability to engage fully in most of the same activities as binocular individuals. He has a long history of holding employment positions requiring the use of eyesight, including truck driver and mechanic, and has even served in the Air Force. In fact, when asked whether his eye impairment has ever interfered with his doing work, or whether he has avoided any types of work because of his eye impairment, Kirkingburg testified, "Not that I recall." (J.A. 275). Although Kirkingburg could not perform the essential functions of the position of truck driver for Albertsons because of his vision impairment, he was not substantially limited in the major life activity of seeing.

b. Cannot ignore long term impact of impairment

The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2). In this context, the term "impact" refers to the "residual effects of the impairment." 29 C.F.R. Pt. 1630, App. § 1630.2(j) (Interpretative Guidance).

When examining this issue, some courts, including the Ninth Circuit, have simply looked to the nature and duration of the impairment and concluded that the individual examined must be substantially limited in the major life

activity of seeing. These analyses are unsound because they ignore the long term impact of the impairment.

The Ninth Circuit employed this flawed analysis in its review of the instant case. The court stated that an impairment is considered substantially limiting if it "significantly restricts as to the condition, *manner*, or duration under which an individual can perform a particular major life activity as compared to the condition, *manner*, or duration under which the average person in the general population can perform that same major life activity" (J.A. 234) (emphasis in original) (citing 29 C.F.R. §1630.2(j)(1)(ii)). The court then concluded that since the manner in which Kirkingburg sees "differs significantly" from the manner in which most people see, he is substantially limited in seeing. It cited an Eighth Circuit case, *Doane v. City of Omaha*, 115 F.3d 624, 627 (CA8 1997), as support for this proposition.¹²

In *Doane*, the Eighth Circuit ruled that a monocular individual was substantially limited in the major life activity of seeing because "[t]he manner in which [he] must sense depth and use peripheral vision is significantly different from the manner in which an average, binocular person performs the same visual activity." *Id.* However, the Eighth Circuit failed to examine the long term impact that monocular vision has on the individual's life -- for example, how the visual impairment affects the individual's normal daily activities.

The Eighth and Ninth Circuits' analyses eliminate the "substantially limited" portion of the statutory definition and render "disabled" every individual who conducts the manner of his or her life differently than most people. Under the

¹² There is nothing in the record to support the conclusion that the manner in which Kirkingburg sees is any different, other than the fact that the visual acuity in his left eye is 20/200.

flawed analysis, every individual with visual acuity worse (or even better) than the national average would be "disabled" under the ADA because he or she sees in a manner that is "different." Even if a monocular individual sees in a manner that is different, he or she is not necessarily significantly restricted in the major life activity of seeing.

Albertsons respectfully asks this Court to hold that a person is not substantially limited in the major life activity of seeing if he or she can participate in most activities that require visual acuity, and any difference in the manner of seeing does not "significantly restrict" his or her seeing.

B. Albertsons did not regard Kirkingburg as disabled.

The Ninth Circuit Court also erred when it ruled that a genuine issue of material fact existed as to whether Albertsons "regarded" Kirkingburg as being substantially limited in any of the major life activities.

The rationale for the "regarded as" prong in the definition of disability is to protect individuals from deprivations based on myths, fears and stereotypes associated with disabilities. 29 C.F.R. Pt. 1630, App. § 1630.2(l) (Interpretative Guidance). The text of the "regarded as" portion of the statute makes clear that a claim of perceived disability requires some element of misperception or prejudice by the employer. As this Court articulated in the Rehabilitation Act case of *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), "... society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from

actual impairment.”¹³

The EEOC Regulations define an individual who is “regarded as having such an impairment” as someone who “has a physical . . . impairment that does not substantially limit major life activities but is treated” as such by an employer or “has a physical . . . impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment” or is simply “treated . . . as having an impairment,” when the individual does not. 29 C.F.R. § 1630.2(l).

Since Albertsons’ perception of Kirkingburg’s impairment was not based on myths, fears or stereotypes associated with disabilities, but instead upon the objective criterion established for nationwide public safety standards, unchanged for decades, Kirkingburg does not fit into any of the three categories described in the Regulations. 29 C.F.R. §1630.2(l).

1. Not treated as being substantially limited in any major life activity

First, Kirkingburg’s vision deficiency was not “perceived by the employer . . . as constituting a substantially limiting impairment.” 29 C.F.R. § 1630.2(l)(1). Instead, the opposite is true. Albertsons offered Kirkingburg another job (the position of Tire Mechanic) which would have required him to perform the major life activities of both

¹³ The ADA can be enforced in a manner consistent with the requirements of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* This Court has acknowledged that it has been directed by Congress to grant at least the same protection to individuals under the ADA as it does to those individuals under the Rehabilitation Act. *Bragdon* at 2202.

working and seeing. Kirkingburg rejected this opportunity.¹⁴

Lower federal courts from many jurisdictions have consistently held that an employer could not have “regarded” an employee as substantially limited in a major life activity when the employer expressly encouraged the employee to engage in that activity by accepting another position of employment. In *Thompson v. Holy Family Hospital*, 121 F.3d 537, 541 (CA9 1997), the Ninth Circuit noted that the employer did not regard a nurse as substantially limited in working where, among other things, it made the nurse aware of other job opportunities at the hospital that did not have the same physical restrictions as her previous job.¹⁵ This reasoning is sound. If an employer truly viewed an employee as being substantially limited in working, that employer would not offer other positions to the employee.

Being perceived by an employer as being unsuitable for one employment position is not enough to raise a “regarded as” claim of disability discrimination. 29 C.F.R. §1630.2(l). Albertsons’ correct perception of Kirkingburg was that he was only disqualified from performing one type of position -- a position that required him to meet DOT minimum safety regulations.

¹⁴ Albertsons also encouraged Kirkingburg to apply for a position in the warehouse.

¹⁵ See also *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (CA5 1998) (since employer attempted to place employee in other positions where she was not disqualified due to back condition, court held that “[s]uch evidence could only permit a reasonable jury to conclude that [employer] believed [employee] to be qualified for other positions”).

2. Attitudes of others did not affect Kirkingburg's physical impairment

Kirkingburg does not have a physical impairment that is substantially limiting only because of the attitudes of others toward the impairment. 29 C.F.R. § 1630.2(l)(2). The Ninth Circuit, in error and without analysis, relied on a statement made by Kirkingburg's supervisor that Kirkingburg was "legally blind, or blind in one eye" to find a fact issue as to whether Albertsons regarded him as disabled (J.A. 236-237).

A causal connection must exist between the perception of disability and an ultimate employment decision to trigger a "regarded as" claim. Such a claim will be successful only "if an individual can show that an employer . . . made an employment decision because of a perception of disability. . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(l) (Interpretative Guidance).

The attitude displayed by Kirkingburg's supervisor when he referred to Kirkingburg as "legally blind, or blind in one eye" is irrelevant. Albertsons' consistent policy required all truck drivers to meet the minimum DOT standards. Kirkingburg was terminated for failing to meet these standards.

No causal connection exists because Albertsons based its decision on Kirkingburg's failure to meet the minimum safety standards established by the DOT.

II. Kirkingburg Is Not Qualified.

The ADA is structured so that an individual's impairment may not be serious enough to rise to the level of "disability," but may be serious enough to render him or her not "qualified." The ADA defines "qualified individual with

a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). An individual can only be qualified if he or she satisfies the "requisite skill, experience, education and other job-related requirements of the employment position, and who, with or without reasonable accommodation, can perform essential functions of such position." 29 C.F.R. § 1630.2(m).

The ADA provides that consideration shall be given to an employer's judgment in identifying what functions of a job are essential. 42 U.S.C. § 12111(8). The Ninth Circuit held that Kirkingburg was a qualified individual with a disability because he could perform the essential functions of the position of truck driver (J.A. 238). This holding is in error.

A. Kirkingburg cannot satisfy the prerequisites of the position.

The ADA's Interpretive Guidance establishes a two-step process for determining whether an individual is qualified. The first step inquires whether the individual satisfies the prerequisites of the position. 29 C.F.R. Pt. 1630, App. § 1630.2(m) (Interpretative Guidance).¹⁶ Legislative history explains that Congress only intended to consider those prerequisites that are "job-related and consistent with business necessity." S.Rep. No. 101-116, 101st Cong., 1st Sess. 27 (1989) (Senate Labor and Human Resources

¹⁶ The second step inquires whether the individual can perform the essential functions of the position with or without reasonable accommodation, which is discussed in Sections II and III, *infra*.

Committee).¹⁷

Albertsons' prerequisite that all interstate truck drivers meet minimum DOT safety regulations is a job-related business judgment. The Company is committed to placing only safe drivers on interstate highways. Kirkingburg is not qualified because he does not meet the objective prerequisite of the position.

In one particularly well reasoned opinion, a lower federal court found an individual who failed to obtain DOT certification for a driving position, where certification was a prerequisite, was not "qualified" under the ADA. *Campbell v. Federal Express Corp.*, 918 F.Supp. 912, 916 (D.Md. 1996). In *Campbell*, an unsuccessful applicant brought an ADA claim against Federal Express after he was rejected for a driving position. The applicant originally held a position with a rival courier company driving a commercial vehicle, a position that had required him to obtain DOT certification. *Id.* at 914. He then applied for a similar position with Federal Express and underwent the requisite DOT applicant medical examination. *Id.* The applicant failed the second DOT medical examination because of a physical impairment to his hand, and Federal Express did not hire him. *Id.* He brought an ADA claim against Federal Express. *Id.* The claim was dismissed because the applicant could not prove he was "qualified" since he lacked DOT certification in seeking a position where DOT certification was a prerequisite. *Id.* at 920. The court looked to the following ADA legislative

¹⁷ The EEOC has indicated it agrees with this approach. See EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, § 2.3(a), page II-12 (Jan. 1992). This Court has previously drawn guidance from the views expressed by the EEOC published in its Technical Assistance Manual. *Bragdon* at 2209.

history for guidance:

With respect to covered entities subject to rules promulgated by the Department of Transportation regarding physical qualifications for drivers of certain classifications of motor vehicles, it is the Committee's intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy any physical qualification standard that is job related and consistent with business necessity in order to be considered a qualified individual with a disability under Title I of this legislation.

Id. at 917, citing H.R.Rep. No. 101-485(II), 101st Cong., 2d Sess. 57 (1990) (House Education and Labor Committee), reprinted in 1990 U.S.C.C.A.N. 303, 339; S.Rep. No. 101-116, 101st Cong., 1st Sess. 27 (1989) (Senate Labor and Human Resources Committee).

The court recognized the applicant felt mistreated by Federal Express (especially since he had already passed an earlier DOT medical examination), but the court ruled that the employer was allowed to enforce its own qualitative standards for drivers, stating, "bureaucratic callousness does not equate to intentional discrimination." *Campbell* at 919.

Campbell parallels the case before this Court. The applicant in *Campbell* failed to meet Federal Express' safety requirements for a position because of a physical impairment. Thus, he was not "qualified" under the ADA. Similarly, Kirkingburg failed to meet the minimum safety requirements to allow him to drive a truck for Albertsons, and is also not "qualified" under the ADA.

Albertsons respectfully asks this Court to follow the line of reasoning found in *Campbell* to rule that Kirkingburg is not qualified under the ADA.

B. Kirkingburg could not perform the essential functions of the job.

The issue whether an individual is "qualified" under the ADA also turns on the individual's ability to perform all the essential functions of a particular job. Although the essential function element is a key component of the ADA, the statute is silent on the meaning of "essential functions."

The EEOC Regulations provide that the term "essential functions" means "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n)(1). The EEOC also provides a list of factors used to determine whether something is an "essential function." One factor the EEOC considers when determining if a function is essential is whether the reason the position exists is to perform that function. 29 C.F.R. § 1630.2(n)(2).

1. Not required to lower its qualitative standards, or justify them

In error, the Ninth Circuit based its reversal of the District Court in part on an argument that Albertsons is required to lower its qualifications for Kirkingburg (J.A. 240, 247-248). The EEOC states:

It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such

standards.

29 C.F.R. Pt. 1630, App. § 1630(n) (Interpretive Guidance). The EEOC Technical Assistance Manual states, "[I]t is the employer's province to establish what a job is and what functions are required to perform it." EEOC Technical Assistance Manual, § 2.3(a) at page II-18. Albertsons is committed to employ only those drivers who meet the DOT minimum safety standards. Forcing Albertsons to accept any less would necessarily require a lowering of objective safety standards, which runs contrary to the EEOC's pronouncement about an employer's business judgment.¹⁸

Additionally, Albertsons is not required to justify its decision regarding the stringency of the qualitative standards applied to each position. The EEOC's Interpretive Guidance provides an example of an employer that operates a hotel and requires its service workers to clean 16 rooms per day. 29 C.F.R. Pt. 1630, App. § 1630.2(n) (Interpretive Guidance). The EEOC states that the hotel "will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement." *Id.* The EEOC also says that an employer that imposes a 75 accurate words per minute typing requirement need not explain why it requires accurate words, nor why it does not only require a 65 words per minute requirement. *Id.* Similarly, Albertsons does not have

¹⁸ See also *Milton v. Scrivner*, 53 F.3d 1118, 1124 (CA10 1995) (employer not required to lower standards for grocery selector position, such as slowing production schedules or lightening workloads, since inquiry into essential functions is not intended to second guess the employer, or to require it to lower company standards); *EEOC v. Amego, Inc.*, 110 F.3d 135, 147 (CA5 1997) (employer's high standards for team leader position did not have to be lowered, and court would not second-guess employer's business judgment regarding these standards).

to provide any justification for requiring its interstate truck drivers to meet minimum DOT vision safety regulations.

The Ninth Circuit held that Albertsons could not "adhere to only a part of the [DOT] regulations, while ignoring the waiver program" (J.A. 240). In so ruling, the court makes one error of fact and one potential error of law. In fact, the experimental waiver program was never a part of the DOT regulations. In electing not to accept the experimental waiver program, Albertsons did not accept one DOT regulation and reject another. The Company exercised its business judgment, grounded in public safety, to set its minimum vision certification by the DOT regulations. What it rejected was an experimental waiver program, conducted for the purpose of determining whether the minimum vision requirements should be modified. The vision requirements were not changed, and have been unchanged since 1970.¹⁹

The potential error of law was to take from Albertsons the very essence of business management -- its business judgment -- and set in its place a judicial determination substantively lowering the certification requirement for vision acuity: from 20/40 corrected (almost perfect 20/20 vision) to 20/200 corrected (legally blind). This is an inappropriate exercise of judicial rule making. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) (this Court has emphasized that the formulation of administrative procedures was "basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments"). The DOT itself has not determined that the waiver program should apply to all employers. And

¹⁹ The DOT has expressly recognized an employer's right to set a higher safety standard than the DOT's minimum. 49 C.F.R. § 390.3(d).

while the DOT continues to grant a few waivers on a case by case basis, nowhere in its regulations does it require an employer to hire a driver with an experimental waiver.

2. Objective evidence demonstrates that driving a truck in interstate commerce is an essential function

The ADA specifically identifies two types of evidence upon which an employer may rely to prove a function is essential: the employer's own judgment as to what functions are essential, and written job descriptions prepared before advertising or interviewing applicants for the job. 42 U.S.C. § 12111(8). The EEOC Regulations reiterate these two and identify additional forms of evidence to be considered in this determination: the amount of time an employee spends on the job performing the function, the consequences of not requiring the incumbent to perform the function, the terms of a collective bargaining agreement, the work experience of past incumbents in the job, and/or the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3).

Analyzing the factors relevant to this case demonstrates that driving a truck in interstate commerce is an essential function of the truck driving position. First, with regard to Albertsons' own judgment, it has long required its drivers to meet the minimum DOT safety requirements. Since Kirkingburg was not able to meet the qualification standard necessary to be able to drive a truck in interstate commerce, he could not perform the essential function in Albertsons' judgment.

Second, although the job description for a truck driver is not in the record, the Company Driver Manual is and can be examined by this Court. The Driver Manual states, "...

you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." Kirkingburg, not able to satisfy the minimum DOT vision requirements, could not comply with "all Department of Transportation safety rules."

Third, with regard to the amount of time spent on the job performing the function in question, since the reason the truck driving position exists is to drive trucks in interstate commerce, it can be said that virtually the entire time spent on the job is spent driving a truck in interstate commerce.

Fourth, regarding the consequences of not requiring an incumbent truck driver to perform the function of highway driving, it is clear from the record that if truck drivers were not required to drive trucks in interstate commerce, their jobs would not exist. Driving trucks in interstate commerce is the sole function of this position.

Therefore, since Kirkingburg could not perform an essential function of the truck driving position, he is not a qualified individual under the ADA.

C. Employing Kirkingburg is a direct safety threat

The ADA expressly states that employers, when setting qualification standards, may impose a requirement "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. §12113(b). The EEOC defines "direct threat" as "a significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r). The purpose of the direct threat standard is to eliminate exclusions not based on objective evidence about the individual involved. H.R. Rep. No. 101-485 (III), 101st Cong., 2d Sess. 45 (1990) (House

Judiciary Committee), reprinted in 1990 U.S.C.C.A.N. 445, 468.

This Court examined the "direct threat" analysis in *Bragdon* in the public accommodation context of a dentist who refused to treat a HIV-infected patient for fear that he might contract the virus from his patient. *Bragdon* at 2201. This Court held that the existence of a significant risk must be determined from the standpoint of the party who refuses the accommodation, and the risk assessment must be based on medical or other objective evidence. *Id.* at 2210, citing *Arline*. Implicit in the *Bragdon* and the *Arline* analyses is that the risk assessment should be based on objective evidence available at the time the employment decision is made. *Id.* at 2211 (referring to "available" medical evidence); *See also Arline* at 288 (referring to judgments made given the state of medical knowledge). Legislative history demonstrates that determination whether a person is qualified should be made at the time of the employment action. H.R. Rep. No. 101-485 (III), 101st Cong., 2d Sess. 34 (1990) (House Judiciary Committee), reprinted in 1990 U.S.C.C.A.N. 445, 456. A good faith belief that a significant risk exists does not relieve the employer of liability. *Bragdon* at 2211.

In addition, the EEOC lists the following factors in determining what constitutes objective evidence with relation to the risk assessment analysis: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. 29 C.F.R. § 1630.2(r). Beyond these suggested factors, the legislative history of the ADA reflects the fact that overall risk to property is also an appropriate factor to consider when reviewing whether an individual poses a direct threat. S.Rep. No. 101-116, 101st Cong., 1st Sess. 27 (1989) (Senate Labor and Human Resources

Committee).²⁰ In the instant case, the imminence and the likelihood of the potential harm cannot be gauged, although the duration of the risk is permanent. Kirkingburg will *always* pose a significant risk to himself and the driving public if allowed to drive a truck in interstate commerce, as his eyesight cannot be improved by any means.

The most significant factors in this analysis are the nature and severity of the potential harm that could occur if Kirkingburg were allowed to drive a truck in interstate commerce, combined with the overall risk to property. The nature of the potential harm is a potential accident in interstate commerce involving a truck driven by Kirkingburg and another vehicle(s). The severity of the potential harm is the possible loss of life for an unknown number of individuals who happen to be on or near the highway at that time. Moreover, such an accident could lead to a negligence lawsuit against Albertsons, which could have major economic consequences. As the Fifth Circuit noted in *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (CA5 1993), *cert. denied*, 511 U.S. 1011 (1994), “[w]oe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident” (quoting *Collier v. City of Dallas*, No.86-1010, slip op. at 3 (CA5 1986) (unpublished)).

Further, although no facts exist in the record to prove the cost of a truck and automobiles in general, it is undeniable that any accident Kirkingburg would be involved in while driving a truck could cause severe and costly damage

²⁰ One Senate Report reads, “[t]he standard to be used in determining whether there is a direct threat is whether the person poses a significant risk to the safety of others *or to property*....” S.Rep. No. 101-116, 101st Cong., 1st Sess. 27 (1989) (Senate Labor and Human Resources Committee) (emphasis added).

to Albertsons’ truck, trailers, cargo, and possibly other vehicles.

Kirkingburg alleges he has only been involved in one prior driving accident and that it was not his fault. This allegation does not reduce the risk of direct threat. The EEOC provides the following example to illustrate a type of individual who is “unqualified” because of the direct threat he poses: an individual with narcolepsy, who frequently and unexpectedly loses consciousness, would not be qualified for a carpentry position with essential functions including the use of power saws and other dangerous equipment. 29 C.F.R. Pt. 1630 App. § 1630.2(r) (Interpretive Guidance).

When the EEOC provided this illustration, it did not find it necessary to provide an example where the individual had been involved in prior accidents, or even where the individual had lost consciousness at work in the past. Instead, the EEOC presented a situation describing an individual whose physical impairment caused the potential for a dangerous situation to occur in the future. In fact, the common usage of the word “threat” describes a future activity, not a recurring scenario. Webster’s Dictionary defines “threat” as “[a]n expression of an *intention* to inflict something harmful,” or “an indication of *impending* danger or harm.” WEBSTER’S II NEW COLLEGE DICTIONARY 1149 (2d ed. 1995) (emphasis added). While a history of past accidents would play a role in determining the likelihood of a safety risk, the absence of prior accidents should in no way be deemed determinative in concluding that no such risk exists.

The EEOC states that if a legitimate direct threat exists, an employer still must determine whether a reasonable accommodation would eliminate the risk or reduce it to an acceptable level. 29 C.F.R. Pt. 1630 App. § 1630.2(r) (Interpretive Guidance). Implicit in this admonition is the need to determine whether the part of the job that is affected

by the direct threat is an essential function of the job. As stated above, the part of the truck driving job that causes the direct threat (driving a truck in interstate commerce) is an essential function of the position. Therefore, the only way to eliminate the risk or reduce it to an acceptable level would be to prohibit Kirkingburg from driving a truck while employed as a truck driver. As demonstrated below, such an accommodation would not be reasonable.

Federal appellate courts that have examined whether individuals with physical impairments could cause a significant risk of harm while driving and have ruled that such individuals are not "qualified" for driving positions. For example, in *Myers v. Hose*, 50 F.3d 278, 282 (CA4 1995), the Fourth Circuit held that an individual's physical impairments (diabetes and a severe heart impairment) made him a safety risk as a bus driver because his condition would profoundly compromise the safety of his passengers, pedestrians, and other motorists. The court noted that "it is not difficult to imagine the public outrage, let alone the potential liability, if plaintiff . . . had an accident [caused by his physical impairment] . . ." *Id.*²¹

Examining this issue from Albertsons' perspective, as the *Bragdon* decision requires, demonstrates that Kirkingburg would have posed a direct threat had he been allowed to continue driving a truck in interstate commerce. Albertsons had objective medical information from a doctor that Kirkingburg's vision was far below minimum DOT safety regulations. This information demonstrates that Kirkingburg

²¹ See also *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (CA5 1995), *cert. denied*, 516 U.S. 1172 (1996) (city bus driver was discharged because his physical impairment -- diabetes -- presented a genuine substantial risk to himself and others, and was ruled not to be qualified under ADA).

posed a substantial risk of harm to himself and to others, and not just a slightly higher risk than the average binocular person.

The Ninth Circuit held that accepting Kirkingburg's experimental vision waiver, and allowing him to circumvent the minimum DOT vision requirements would be a reasonable accommodation. The Ninth Circuit touted the experimental DOT waiver program as demonstrating that monocular drivers are safer than binocular drivers by comparing the driving records of monocular drivers in the experimental waiver program with those of binocular drivers under regular DOT certification (J.A. 241). The Ninth Circuit, in making this proclamation, relied upon a study that was issued 2 years after Albertsons made the decision not to accept Kirkingburg's experimental waiver. (J.A. 241); *Qualification of Drivers*, 59 Fed. Reg. 59386, 59389 (1994). At the time Kirkingburg presented his waiver to Albertsons, the experimental program was merely a study program, conducted to determine if the DOT's vision requirements should be modified. The FHWA was undertaking the study to determine the safety of lowering the requirements. *Qualification of Drivers*, 57 Fed. Reg. 31458, 31458 (1992). Apparently, it was found that those requirements could not be safely lowered, as they have remained unchanged.

Therefore, Albertsons respectfully requests that this Court determine that Kirkingburg is not "qualified" for the position of truck driver because objective evidence demonstrates that allowing him to drive a truck in interstate commerce would pose a direct safety threat.

III. Albertsons Satisfied Any Duty it Had to Reasonably Accommodate Kirkingburg.

The ADA does not require Albertsons to lower its

standards or modify an essential function of the job to allow Kirkingburg to drive a truck. The ADA does not require an employer to consider other job positions. If this Court finds such a requirement, Albertsons met it by offering Kirkingburg work as a Tire Mechanic.

A. Kirkingburg is not an "otherwise qualified" individual with or without reasonable accommodation.

Determining whether an individual is a "qualified individual with a disability" is a two-part analysis, the first of which was analyzed above in Section II, *supra*. The second prong requires that an employee can perform the essential functions of the position with or without reasonable accommodation. 29 C.F.R. Pt. 1630, App. § 1630.2(m) (Interpretive Guidance). The EEOC describes the motivation for this second component as "to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position." *Id.*

An employer has an obligation to provide individuals who are "otherwise qualified" with reasonable accommodation. The EEOC explains the reasons for including the term "otherwise qualified" as follows:

The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of section 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection

criteria. An individual with a disability is "otherwise qualified," in other words, if he or she is qualified for a job, except that because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

29 C.F.R. Pt. 1630, App. § 1630.9 (Interpretive Guidance).²²

²² The ADA's legislative history and the EEOC Interpretive Guidance also provide an example demonstrating the interrelationship between the concepts of "qualified" and "reasonable accommodation." A law firm requiring all incoming lawyers to have graduated from an accredited law school and passed the bar examination need not provide an accommodation to an individual with a visual impairment who has not met these selection criteria. S.Rep. No. 101-116, 101st Cong., 1st Sess. 33 (1989) (Senate Labor and Human Resources Committee). Even if the reason the individual did not graduate from an accredited law school is a vision impairment, the applicant is not entitled to a reasonable accommodation because he or she is not "otherwise qualified" for the position. *Id.* The EEOC adopted this legislative history. 29 C.F.R. Pt. 1630, App. § 1630.9 (Interpretive Guidance).

The situation is different if the attorney applicant with a visual impairment has graduated from an accredited law school and passed the bar examination. S.Rep. No. 101-116 at 33-34. In that case, the legislative history provides that the individual would be "otherwise qualified," and the law firm would be required to provide a reasonable accommodation (such as providing a machine that magnifies print) to enable the individual to perform the essential functions of the attorney position, unless the necessary accommodation would impose an undue hardship on the law firm. *Id.* at 34.

In the law firm example, the employer's objective standards are set in reference to criteria external to the work place: law school accreditation and passing an exam established by the state regulating agency. Here, the external criteria used to determine whether Kirkingburg or any truck driver applicant or incumbent was qualified for the position of interstate truck driver was Albertsons' requirement that he or she meet the minimum safety standards in the DOT Regulations.

Kirkingburg is not an "otherwise qualified individual" entitled to a reasonable accommodation. Meeting minimum DOT safety requirements is a prerequisite for Kirkingburg's job as a truck driver for Albertsons. He was unable to perform an essential function of his job as a truck driver for Albertsons because he was unable to meet minimum DOT safety standards. No accommodation exists -- no visual aid or other prosthetic device -- that would render Kirkingburg able to meet the minimum visual acuity standards set forth in the DOT regulations. Albertsons was not obligated to waive satisfaction of the minimum DOT safety standards, because meeting those requirements was a job-related safety standard required of all interstate truck drivers.

B. Waiving minimum requirements is not a reasonable accommodation.

The Secretary of Transportation is charged with ensuring that "the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely." 49 U.S.C. § 31136(a)(3). The FHWA promulgates the DOT regulations to meet that obligation, and Albertsons requires all of its interstate truck drivers to meet the minimum DOT safety regulations. The evidence is uncontroverted that Kirkingburg does not meet the minimum visual acuity requirements set forth in 49 C.F.R. § 391.41(b)(10).

The experimental waiver program at issue here was conducted to evaluate the viability of excepting certain drivers who failed to meet minimum DOT vision requirements for the purpose of gathering empirical data and determining whether to lower the statutory visual acuity requirements. Specifically, the stated purpose of the waiver experiment was as follows:

[T]he proposed waiver program will enable the FHWA to conduct a study comparing a group of experienced visually deficient drivers with a control group of experienced drivers who meet the federal vision requirements.

Qualification of Drivers, 57 Fed. Reg. 23370, 23370 (1992).

In short, the experimental waiver program was implemented to see how safe (or unsafe) drivers who did not meet the current vision standards in 49 C.F.R. § 391.41(b)(10) might be. The ultimate goal of the FHWA in experimenting with a vision waiver program was to evaluate and assess the risk of lowering the established minimum DOT visual acuity requirements to pursue the spirit of the ADA. Qualification of Drivers, 57 Fed. Reg. 6793, 6793 (1992); see also H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 57 (1990) (House Committee on Education and Labor), reprinted in 1990 U.S.C.C.A.N. 303, 339.

Contrary to the findings of the Ninth Circuit, the experimental waiver program itself was not, nor was it intended to be, a direct method of complying with the ADA. The program was an experimental study to gather data and determine whether changes to the minimum qualifications were viable; and, if so, to assess whether the changes should eventually be adopted as modifications in the minimum DOT regulations.

The experimental vision waiver program started granting waivers in July of 1992. Kirkingburg was terminated in November of 1992. The experimental waiver program has not been adopted into the minimum DOT safety requirements and the DOT vision requirements remain unchanged. Albertsons should not be required to accept an experimental waiver of the minimum vision safety standards which it requires all its drivers to meet.

C. No obligation to reassign as a reasonable accommodation

The ADA defines the term "qualified individual with a disability" as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. 42 U.S.C. § 12111(8). The Act further provides that reasonable accommodation "may include" reassignment to another position. 42 U.S.C. § 12111(9).

Subsequently, several courts adopted the view that an employer has an affirmative duty to reassign a qualified individual, when the individual cannot be reasonably accommodated to perform the essential functions in the employee's current position.²³ This interpretation goes beyond the ADA's intended mandate of an employer's obligations.²⁴

An employee does not meet the ADA's definition of "qualified individual with a disability" if the employer cannot reasonably accommodate the employee in the employee's current position. Further, requiring an employer to reassign an employee as a reasonable accommodation results in affirmative action in favor of an individual with disabilities. The ADA was designed to prohibit discrimination against qualified individuals, not to require affirmative action in

²³ See, e.g., *Monette v. Electronic Data Systems*, 90 F.3d 1173 (CA6 1996).

²⁴ If this Court determines that Congress has not directly addressed this issue, or that the ADA is ambiguous, the question for this Court is "whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 842-843.

favor of them. See 42 U.S.C. § 12101(b)(1); see also *Daugherty* at 700.

Compare the ADA's suggestion of reassignment as a reasonable accommodation to state workers' compensation statutes. Many workers' compensation schemes include an affirmative duty for the employer to reinstate employees who suffered on-the-job injuries to other positions if the employee returns to work unable to perform the employee's original job, or if the job is no longer available.²⁵ In the workers' compensation context, expansive reinstatement obligations make sense as a matter of public policy. The employer's duty is appropriately heightened in that situation because the employee was injured on the job.

The goal of the ADA is to ensure equal treatment for qualified individuals with a disability.²⁶ To interpret the ADA to require employers to reassign employees who are unable to perform the essential functions of their job at injury to some other available and suitable position would convert the ADA into a form of super workers' compensation statute, a result not intended by the legislature.

An employer must have some point at which it has met its obligations under the ADA. Allowing an employee to reject position after position -- without relieving the obligation of the employer -- is counterintuitive to the direction provided in the statute.

Albertsons went beyond any obligation under the ADA to reasonably accommodate Kirkingburg by offering to

²⁵ See, e.g., O.R.S. § 659.420 (Oregon); FL ST § 440.15 (Florida).

²⁶ If that disability arose on the job, the various state workers' compensation statutes will afford the employee the additional protection of that system.

reassign him to a job as a Tire Mechanic. Kirkingburg refused the offer. Even assuming he was otherwise entitled to the protection of the ADA, Kirkingburg lost the protection when he rejected Albertsons' offer to transfer him to the position of Tire Mechanic. 29 C.F.R. § 1630.9(d).

D. No reasonable accommodation required in cases where an individual is "regarded" as disabled.

The underlying goal of accommodation is to remove a barrier to enable an employee to perform the essential functions of his or her job. EEOC Technical Assistance Manual § 3.2, page III-2; see also 29 C.F.R. Pt. 1630, App. §1630.9(a) (Interpretive Guidance). In the case of individuals who are merely "regarded as" having a disability, the single workplace barrier at issue is the attitude of the employer and, consequently, the employer's alleged discrimination against the individual based on the perceived disability. The EEOC states "persons who are *regarded* as having a substantially limiting impairment are not entitled to reasonable accommodation." EEOC ADA Case Study Training Manual 1996, C.S.1 at page 6 (emphasis in original).

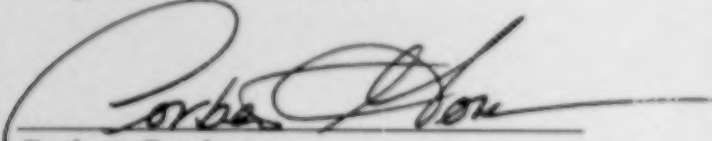
An individual who is regarded as disabled does not need a reasonable accommodation in order to perform the essential functions of his or her job. The employer's obligation is simply to remove the barrier of a false perception.

CONCLUSION

For the foregoing reasons, Albertsons respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit. This Court

should hold that Kirkingburg does not have a "disability" as defined in the Americans with Disabilities Act. In the alternative, this Court should hold that Kirkingburg is not a "qualified individual with a disability," or that Albertsons satisfied its reasonable accommodation obligation.

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Supreme Court, U.S.

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No. 98-591

In The

Supreme Court of The United States
October Term, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. (a) Whether an individual with exotropic strabismus, an outward eye turn, resulting in amblyopia, a vision condition marked by reduced visual acuity not correctable by refractive means and not attributable to eye disease, is "disabled" under the Americans with Disabilities Act ("ADA").

(b) Whether an individual with monocular vision is substantially limited in the major life activity of seeing and thus disabled *per se* under the ADA.

2. Whether an employer may choose to adhere to only some of the Department of Transportation's regulations and reject the Department's program to bring those regulations into compliance with the ADA without making an individual assessment of an asserted safety risk.

3. Whether a leave of absence to obtain a vision waiver or reassignment is a reasonable accommodation for an individual who has monocular vision and is employed as a commercial truck driver.

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STATUTORY PROVISIONS INVOLVED

Pertinent portions of the following statutes and regulations are included in the Appendix to Respondent's Brief:

Relevant Federal Statutes

42 U.S.C. § 12102(2)
42 U.S.C. § 12111(3), (8), and (9)
42 U.S.C. § 12112(a) and (b)
42 U.S.C. § 12113(a) and (b)

Relevant Federal Regulations

29 C.F.R. § 1630.2

Relevant State Statutes

ORS 659.415
ORS 659.420

STATEMENT OF THE CASE

Hallie Kirkingburg, a professional truck driver for over thirteen years who has amblyopia resulting in reduced visual acuity of 20/200 *corrected* in his left eye, filed suit in district court alleging that his former employer, Albertsons, Inc., discriminated against him on account of his vision disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112(a) (1994), ("ADA" or "the Act") and failed to reasonably accommodate him. Joint Appendix ("J.A.") 4-6. Albertsons moved "for summary judgment in its favor on the ground that Kirkingburg was not 'otherwise qualified' to

perform the job of truck driver with or without reasonable accommodation." J.A. 39-40. The district court agreed with Albertsons and granted its motion for summary judgment. Kirkingburg appealed. The Ninth Circuit held, in a 2-1 decision, that the granting of summary judgment was erroneous, in part because Albertsons' asserted job requirement that its drivers meet the Department of Transportation ("DOT") vision requirements while not accepting a DOT waiver¹ of those vision requirements screened out otherwise qualified individuals with disabilities and therefore is invalid. J.A. 248. Albertsons petitioned for a writ of certiorari.

Since approximately 1979, Kirkingburg has driven commercial trucks for different employers or independently. J.A. 11. He has a near-perfect driving record. J.A. 289-290, 295-296. He has only been in one accident, and that was determined to not be his fault. J.A. 290. He has no suspensions, no revocations, no reportable accidents in which a citation was issued to him, and no disqualifying moving citations on his driving record. J.A. 295-296, 347-348, 355.

Albertsons hired Kirkingburg in August 1990 as a truck driver at its Distribution Center in Portland, Oregon. J.A. 49. When Albertsons hired Kirkingburg, its transportation manager, Mr. Ted Sturgill, gave him a 18-mile road test in which he found Kirkingburg to be a safe driver. J.A. 349, 358. Afterwards the transportation manager certified, "It is my considered opinion that [t]his driver possesses *sufficient driving skill to operate safely* the type of *commercial motor vehicle* listed above." J.A. 358 (emphasis supplied). The vehicle referenced was a 1988 Kenwood, with a 1989 fifty foot utility trailer. J.A. 358.

¹ Waivers are issued by the Federal Highway Administration ("FHWA"), an administration of the DOT. 49 U.S.C. § 104(a).

Kirkingburg passed the physical examination he was given at the time of his hire in 1990. J.A. 345-346, 360. He had a valid DOT card and valid medical certificate to drive a truck at the time. J.A. 346-347, 360.

After Kirkingburg started driving for Albertsons, the transportation manager found him to be a "safe driver." J.A. 344. Likewise, the general manager, Mr. Frank Riddle, found Kirkingburg to be a good, safe driver. J.A. 312, 316.

Kirkingburg has always had 20/200 corrected vision in his left eye, it has not changed. J.A. 12, 32, 35. He has 20/20 corrected vision in his right eye. J.A. 35. The reduced acuity in his left eye is due to amblyopia (ICD-9 368.0). *Id.* Amblyopia is a condition marked by low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease. *Id.* In Kirkingburg's case the amblyopia is caused by a longstanding left eye turn (exotropia ICD-9 378.10). *Id.* He has strabismus, an eye turn. J.A. 300. He has had amblyopia since childhood. J.A. 35. Amblyopia is said to exist if the vision is 20/30 or worse with best correction. J.A. 35.

In the opinion of his treating doctor of optometry, Dr. Beatrice Michel, Kirkingburg can easily perform the driving tasks required of him. J.A. 34-36, 304-306. The amblyopia in his left eye does "not interfere with his ability to drive." J.A. 35-36. According to Kirkingburg, his amblyopia has never interfered with his work, with the exception of the problem it created with Albertsons. J.A. 275.

Individuals with full sight in both eyes, binocular as opposed to monocular vision, can rely upon binocular cues for the stereopsis skill. J.A. 300-303. Stereopsis is the ability for both eyes working together to have depth perception limited to short distances rather than long distances. J.A. 300.

"Stereopsis - the relative localization of visual objects in depth - can occur only in binocular

vision and is based on a physiologic process derived from the organization of the sensory visual system. It is not acquired through experience and is unequivocal and inescapable."

Gunter K. von Noorden, M.D., *Binocular Vision And Ocular Motility - Theory and Management of Strabismus*, (Mosby 5th ed. 1996),² p. 27. "Stereopsis is defined as the relative ordering of objects in depth, that is, in the third dimension." *Id.* at 23.

For distance depth perception, monocular cues are primarily relied upon. J.A. 300-301. These monocular cues to depth perception are particularly pertinent for Kirkingburg as it is related to his diagnosis of strabismus. J.A. 300; see von Noorden, *Binocular Vision and Ocular Motility*, supra, at 28-30.³

According to Kirkingburg's treating doctor of optometry, Dr. Michel, "there's a lot of misunderstanding about two-eyed vision and what cues are needed to have proper depth perception. . . ." J.A. 301. Dr. Michel testified:

"People, I think, assume that two eyes are needed for full depth perception when in fact there are significant monocular cues to depth that rely on the vision of one eye only to allow a person to have correct spatial orientation."

J.A. 301. These monocular cues include motion parallax,

² Dr. Michel cited to the second edition of Dr. von Noorden's treatise in her deposition testimony. J.A. 300. Hereinafter the fifth edition will be cited as von Noorden, *Binocular Vision and Ocular Motility*.

³Based upon the deposition testimony of Dr. Michel and von Noorden's treatise, the terms "cue" and "clue" appear to be synonymous in this context.

linear perspective, overlay contours, distribution of lights and shadows, the known size of objects, and aerial perspective. J.A. 301.⁴ As Dr. Michel explained, "So while the stereopsis test is the test that's required and asked for by DOT, in certain situations like distance viewing, it's not going to be a really particularly relevant or necessary skill." J.A. 301.

In late 1991, after he had been on the job and driving safely for over a year, Kirkingburg suffered a non-driving, work-related injury when he fell from a truck. J.A. 274, 283. He was off work for almost a year, until he was released unconditionally to return to work on November 3, 1992. J.A. 283. Instead of returning him to work, Albertsons sent him to its doctor for an examination. J.A. 283-284.

In November 1992, the examining physician gave Kirkingburg a thorough examination and correctly determined that his vision was 20/20 in his right eye and 20/200 in his left eye, with corrective lenses. J.A. 284, 357. The doctor did not certify him under the DOT regulations⁵ and informed Albertsons of his finding on November 6, 1992. J.A. 357, 375. The doctor, or his nurse, told Kirkingburg he needed a "vision waiver." J.A. 284.

Prior to November 6, 1992, the DOT instituted a vision

⁴ See also, von Noorden, *Binocular Vision And Ocular Motility*, supra, at 27-28 defining each term.

⁵ According to the standard DOT regulations, operators of commercial motor vehicles should have a "distance visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distance binocular acuity of at least 20/40 (Snellen) with or without corrective lenses." 49 C.F.R. § 391.41(b)(10). Despite Kirkingburg's amblyopia, twice before 1992, when he was hired and again in 1991, he was inaccurately certified as meeting the DOT standard regulations. J.A. 360-361.

waiver program whereby under certain specified limited circumstances it would issue waivers to allow drivers who could not meet the regular vision qualifications of the DOT to operate commercial motor vehicles. 57 Fed. Reg. 31457, 31458 (July 1992); J.A. 389. The vision waiver program was instituted by the FHWA for the purpose of bringing the DOT's vision standards into compliance with the Americans With Disabilities Act without sacrificing highway safety. 57 Fed. Reg. 10295 (March 1992); 57 Fed. Reg. 23370, 23371 (June 1992) ("The FHWA believes, that because it will be consistent with the national policy to facilitate the employment of qualified individuals with disabilities, the waiver program will be in the 'public interest'"); 57 Fed. Reg. 31457, 31459 (July 1992).

Albertsons drivers are to be certified by the Department of Transportation. J.A. 314-315, 344. Albertsons had no physical requirements for vision other than what is contained in DOT regulations. *Id.* Albertsons states it operated by the DOT rules and regulations. J.A. 344. However, there is nothing in writing at Albertsons which specifically adopts the DOT physical requirements as its own. J.A. 340.

Although Albertsons claimed it would not allow its drivers to drive unless they met the minimum DOT vision requirement of 20/40 corrected vision in each eye (J.A. 392), Kirkingburg was allowed to drive for it when first hired in 1990 despite a reported corrected vision of 20/70 in his left eye (J.A. 360), and was permitted to drive in 1991 despite a reported corrected vision of 20/100 in his left eye. J.A. 361. These reports were in Albertsons' possession at the time and raised no "red flags." J.A. 293-294, 341-347, 349-350. No effort was made to disqualify him. J.A. 345-346. He was considered to be a safe driver. J.A. 316, 344, 349.

In order to obtain a vision waiver under the FHWA program, Kirkingburg was required to establish, among other

things, that he had three years of recent experience driving a commercial vehicle without (1) license suspension or revocation, (2) involvement in a reportable accident in which he received a citation for a moving violation, (3) convictions for a disqualifying offense or more than one serious traffic violation, and (4) more than two convictions for any other moving violation in a commercial vehicle. 57 Fed. Reg. 31457, 31460 (1992). In addition, he was required to present proof from an ophthalmologist or an optometrist certifying that his visual deficiency had not worsened since his last examination, that the vision in one eye at least is correctable to 20/40, and that with his "vision deficiency" he is "able to perform the driving tasks required to operate a commercial motor vehicle." *Id.* at 31460.

In other words, as the FHWA stated: "All drivers eligible for a waiver [must] have proven experience and have demonstrated their ability to safely operate a [commercial motor vehicle] for a number of years." *Id.* at 31459.

In December 1992, in accordance with the examining physician's instructions to get a vision waiver, Kirkingburg requested Albertsons help in obtaining the waiver. J.A. 367-369. The DOT required that the employer provide certain of the information necessary to obtain the waiver. J.A. 369-373. Albertsons refused to assist Kirkingburg in obtaining the waiver. J.A. 325-326, 374-375. Kirkingburg had first applied for the waiver on November 12, 1992. J.A. 369. Mr. Sturgill had told Kirkingburg on November 6, 1992 that the vision waiver was to be a "corporate decision." J.A. 367.

On November 20, 1992, Mr. Sturgill called Kirkingburg and informed him that, "We're not going to accept the waiver." J.A. 275-276, 338, 364, 367. The decision was made by Albertsons' corporate legal department - "Boise Legal." J.A. 338-339. Kirkingburg was terminated that day. J.A. 275-276, 365. Mr. Riddle told Mr. Sturgill that

Kirkingburg was terminated because he had failed the visual part of the DOT physical and that the company would not accept a vision waiver. J.A. 338. There was no other reason for his termination. J.A. 339. In the conversation in which Mr. Riddle directed Mr. Sturgill to terminate Kirkingburg, Mr. Riddle stated Kirkingburg "was legally blind, or blind in one eye." J.A. 341.

There is evidence Albertsons did not consider an alternative position for Kirkingburg prior to terminating his employment. J.A. 309, 313-314, 339-340, 343.

Albertsons' personnel manager, Mr. Charlie Norris, was aware of the company's obligation to reasonably accommodate disabilities, but knew of no undue hardship to the company by accepting a vision waiver. J.A. 307-308. Mr. Sturgill believed the undue hardship to be the "liability." J.A. 347. Mr. Sturgill was not involved in any attempts to accommodate Kirkingburg in ways other than accepting the DOT waiver. J.A. 352. Mr. Riddle testified that Albertsons would accept changes in DOT minimum requirements, but not accept the DOT's waiver of standard requirements to accommodate disabled persons. J.A. 315.

In late February 1993, Kirkingburg received a vision waiver from the Federal Highway Administration. J.A. 276, 379-382. The FHWA vision waiver expressly "authorizes the . . . named individual to operate a [commercial motor vehicle] in interstate commerce. . ." under certain specified conditions. J.A. 381-382. Kirkingburg informed Albertsons he had obtained the vision waiver in March 1993. J.A. 385, 386-387. Albertsons never questioned whether Kirkingburg's vision waiver was valid or not. J.A. 351.

Previously, in November and December, 1992, Kirkingburg had requested to be reinstated. J.A. 367-368. Albertsons denied his request. J.A. 374-375.

After Kirkingburg obtained his vision waiver and while he had a valid DOT card, Albertsons spoke to him about a yard hostler position. J.A. 271, 320-321, 343. This was the first job Albertsons spoke about with Kirkingburg. J.A. 277. Although Albertsons required DOT certification for that position, the job was designed such that not all yard hostlers had to be certified. J.A. 321, 324. Indeed, Albertsons would allow workers with license restrictions, such as due to alcohol, to be yard hostlers. J.A. 324-325. Although Kirkingburg did what he was told to get the yard hostler position, and thought he had obtained it, Albertsons never gave him the job. J.A. 32, 271, 277-280. Later, Albertsons informed the Oregon Bureau of Labor and Industries that it withdrew the offer because "we became concerned because the position does require DOT certification." J.A. 395-396. However, Mr. Riddle was unaware the offer had been withdrawn, having been told by an Albertsons' attorney that Kirkingburg had turned down the position. J.A. 321-322, 327. Kirkingburg never turned down the position. J.A. 32.

Some time later, Albertsons discussed a second job, tireman, with Kirkingburg, but he rejected that position because he had never changed a truck tire in his life, was told it paid \$5 or \$6 less per hour than he had been making, it would not get him back to driving trucks, and he understood he was not qualified for the job. J.A. 280-282.

Other jobs, including truck driving positions, became available but were not discussed with Kirkingburg. J.A. 268, 269, 280-281.

In June 1993, Scott Jardine, Corporate Director of Transportation, issued a memorandum stating the company's policy as follows:

"In situations where reasonable accommodations to a driver with a disability are legally required, our priority is to accommodate

the driver in ways other than a DOT minimum qualification waiver."

J.A. 389-390. Previously in 1993, Mr. Jardine had identified Kirkingburg as the "driver with the vision problem in Portland." J.A. 376.

SUMMARY OF ARGUMENT

This Court should affirm the Ninth Circuit's opinion in this case in its entirety. The Ninth Circuit correctly reversed the district court's granting of summary judgment on Kirkingburg's claim under the ADA. The court correctly held that Kirkingburg was disabled under the Act, and that there were genuine questions of fact as to whether he was a qualified individual under the Act in that he could perform the essential functions of the commercial truck driver position. The court also correctly ruled that Albertsons could not choose to follow only one part of the federal regulatory scheme (the DOT's standard minimum vision requirements) while rejecting another part of the regulatory scheme (the FHWA vision waiver program), in part because Albertsons had failed to produce any evidence that Kirkingburg or any other vision waiver recipient posed a direct safety threat.

1. Kirkingburg Is Disabled.

Kirkingburg has a physical impairment that substantially limits the major life activity of seeing. He has exotropic strabismus, an outward eye turn, resulting in amblyopia, a vision condition marked by reduced visual acuity not correctable by refractive means and not attributable to eye disease. He has reduced visual acuity of 20/200 corrected in his left eye, a loss of some peripheral vision, and altered short-

distance depth perception. Kirkingburg has monocular vision, that is he essentially sees out of one eye. Due to his monocular vision, Kirkingburg is incapable of using binocular mechanisms, stereopsis, for perceiving near-distance depth perception. Stereopsis is the skill of two eyes being able to sense three dimensional near-distance depth perception. Kirkingburg's absolute inability to perform stereopsis, his significant loss of acuity in one eye, and the overall narrowing of his peripheral vision constitute a substantial limitation in the major life activity of seeing.

Although his mind has made adjustments and accommodations so that he is able to cope with his vision impairment, Kirkingburg is significantly restricted as to the condition and manner in which he "sees" as compared to the average person in the general population. These adaptations and adjustments enable Kirkingburg to cope with his vision impairment and thus function in everyday life. However, the fact that he has mitigated the effects of his impairment does not mean that he is therefore not protected by the provisions of the Act. 29 C.F.R. Pt. 1630, App. § 1630.2(j).

The substantial limitation requirement does not require Kirkingburg to establish both that his sight is significantly restricted as compared to the average person and also that his limitation in sight substantially limits his ability to perform some indeterminate number of his or some average individual's routine daily activities. Albertsons' proposed standard that "substantially limited" requires that daily life activities involved with the major life activity be significantly restricted is too restrictive a standard for the definition of disability, is inconsistent with the statutory language, and is contrary to this Court's holding in *Bragdon v. Abbott*, where the Court ruled that a major life activity need not be a public, economic, or daily activity. 524 U.S. 624, ---, 118 S.Ct. 2196,

2205 (1998). Albertsons' proposed standard attempts to create a dysfunctional component to the definition of "disabled," when functionality should be addressed in the "otherwise qualified" analysis.

2. Albertsons Perceived Kirkingburg To Be Disabled.

Kirkingburg also produced evidence that Albertsons perceived him to be disabled. Because this issue was not properly raised in Albertsons' original questions presented in its Petition for Writ of Certiorari, this Court need not, and indeed should not, address this issue. *Blessing v. Freestone*, 520 U.S. 329, 340 n. 3, 117 S.Ct. 1353, 1359 n. 3 (1997). Since it provides an alternative basis for the Ninth Circuit's opinion, this case should be remanded for trial regardless of the Court's ruling on the issues properly presented.

Recognizing the Court's inherent ability to address the perceived disability claim should it choose to, Kirkingburg argues that Albertsons took adverse action against him based upon its view that his vision was inadequate and thus disabling. Kirkingburg's supervisor's referred to him as "legally blind or blind in one eye," J.A. 341, when Albertsons terminated him. Since Albertsons terminated Kirkingburg from its employment without considering any alternative positions prior to his termination, there is evidence Albertsons terminated him from the type of employment involved due to its perception of his vision impairment. Thus, there is evidence Albertsons perceived Kirkingburg's vision impairment to substantially limit the major life activity of seeing and working.

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3. Kirkingburg Can Perform The Essential Functions Of The Truck Driving Position.

Despite Kirkingburg's lifelong amblyopia, given the nature of that condition and his ability to develop adaptations and adjustments for coping with his visual impairment, Kirkingburg is able to drive a commercial truck safely. Since Kirkingburg has had monocular vision throughout his life, he has developed the use of monocular cues that enable him to effectively sense distance depth perception. Although persons with monocular vision cannot perform stereopsis, it is the development of adaptations and adjustments, including the use of monocular cues, that enables Kirkingburg to drive safely.

Kirkingburg produced evidence that he had driven a commercial truck safely for approximately eleven years before being hired by Albertsons, was given an 18 mile road test by Albertsons when he was hired after which Albertsons certified that he "possesses sufficient driving skill to operate safely" a commercial truck and trailer, and Albertsons found him to be a safe driver for the approximately 16 months that he drove for it. Given this past history of safe driving and Albertsons' own assessment of Kirkingburg as a safe driver, the Ninth Circuit correctly held that a reasonable fact finder could conclude that Kirkingburg was able to perform the essential functions of the commercial truck driving position.

4. Albertsons Could Not Reject The Vision Waiver For The Reasons It Did. It Had No Evidence Kirkingburg Posed A Direct Safety Threat.

As did the Ninth Circuit, this Court should reject Albertsons' argument that its business judgment justifies

insisting on its drivers meeting one set of DOT standards to the exclusion of the FHWA's vision waiver program, which was instituted in order to comply with the ADA. The DOT certification was a prerequisite to the job, not an essential function of the job. Albertsons, or any other employer, is not free to insist on following only one part of the DOT regulations, while ignoring the vision waiver program that the FHWA used to bring its regulations into compliance with the ADA, when in doing so it screens out a class of individuals on the basis of a disability without individual assessment.

Any job prerequisite that blanketly screens out individuals with disabilities must be justified by the employer as job-related and consistent with business necessity. 42 U.S.C. § 12113(a). Here, Albertsons' insistence on only following the standard minimum vision requirements and its rejection of the vision waiver program in the absence of individual assessment is not job related, nor is it justified by business necessity, because without the individual assessment it cannot legitimately be said to be closely related to, nor necessary to perform, the essential function of driving a commercial truck. More importantly, Albertsons cannot justify its rejection of the vision waiver program on generalized fears about safety. That is precisely the type of discrimination the ADA was meant to protect against.

Ultimately, Albertsons' argument is that, as an employer, it has a right to exercise its business judgment to adopt the regular DOT vision standards as its own and refuse to accept the FHWA vision waiver program. However, under the ADA and other federal discrimination laws the employer's business judgment is not absolute. In order to justify its termination of Kirkingburg due to his amblyopia based upon its asserted fears about safety, Albertsons was required to do an individual assessment of Kirkingburg and determine if he

was a direct safety threat based upon objective evidence. However, the Ninth Circuit correctly found that "Albertsons has simply failed to produce any evidence that Kirkingburg and any other waiver recipients pose a direct safety threat." J.A. 246. The individual assessment that was made as to whether Kirkingburg posed a direct safety threat was made by the FHWA when it determined he was a safe driver through its vision waiver program. Indeed, prior to learning of Kirkingburg's disability, Albertsons itself found Kirkingburg to be a safe driver and certified that assessment. In the absence of an individualized assessment, Albertsons did not have the right to assert that all individuals with Kirkingburg's vision impairment are unsafe to drive based upon the DOT minimum requirements that the FHWA had determined could be safely waived.

5. Albertsons Failed To Accommodate Kirkingburg Prior To Terminating His Employment And Any Post Termination Attempt At Accommodation Does Not Relieve It From Liability For The Termination.

There is no evidence Albertsons considered reassignment to a vacant position before it terminated Kirkingburg. Reassignment is one form of reasonable accommodation specifically provided for under the statute. 42 U.S.C. § 12111(9)(B). The yard hostler position could have been used for a reassignment. Any attempt by Albertsons to offer Kirkingburg a job as a tireman months after it terminated Kirkingburg was not a reasonable accommodation, given the nature of the job, and it was made too late to insulate Albertsons from liability for the prior termination.

ARGUMENT

I. **Kirkingburg Is Disabled Under The ADA: His Physical Impairment of Amblyopia Substantially Limits The Major Life Activity Of Seeing.**

Under Title I of the ADA, no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual" in regard to the terms, conditions, or privileges of employment. 42 U.S.C. § 12112(a). In this case, there is no dispute as to whether Albertsons terminated Kirkingburg's employment due to his vision condition, amblyopia due to exotropia strabismus. It did. J.A. 338-339. The primary issue is whether Kirkingburg is protected under the ADA.

The ADA defines disability as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such impairment.

42 U.S.C. § 12102(2). Kirkingburg brought claims under both subsection (A), physical disability, and subsection (C), perceived disability. J.A. 4-6.

Determining whether an individual has an actual disability under subsection (A) involves three steps: (1) the plaintiff must establish he or she has a physical or mental impairment; (2) the plaintiff must identify a major life activity which is impacted by the impairment; and (3) the impairment must substantially limit the major life activity identified. *Bragdon v. Abbott*, 524 U.S. at ---, 118 S.Ct. at 2202.

The statute does not provide definitions for

"impairment," "major life activity," or "substantially limited." However, the Equal Employment Opportunity Commission ("EEOC"), the agency delegated authority to carry out the ADA, 42 U.S.C. § 12116, has defined these terms in its implementing regulations. 29 C.F.R. § 1630 *et seq.* As reasonable agency interpretations of the statute, the EEOC regulations are entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844, 104 S.Ct. 2278, 2782-2783 (1984). In addition to the implementing regulations, the EEOC has published an Interpretive Guidance on the ADA as an appendix to the regulations. See 29 C.F.R. Pt. 1630, App. As this Court has stated, "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2206.

A. **Kirkingburg's Strabismus And Resulting Amblyopia Is A Physical Impairment Under The Act.**

Under the regulations, physical impairment is defined as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting . . . special sense organs." 29 C.F.R. § 1630.2(h)(1). Kirkingburg has strabismus, an eye turn, resulting in amblyopia, a condition marked by low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease. J.A. 35, 300. Kirkingburg has reduced visual acuity of 20/200 corrected vision in his left eye. Thus, Kirkingburg's physiological condition affecting a sensory organ is an impairment under the Act.

B. Seeing Is A Major Life Activity And The Only Major Life Activity That Need Be Considered.

Adopting the definition of the term from the Rehabilitation Act regulations, 34 C.F.R. §104, the EEOC has interpreted major life activities as "those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. Pt. 1630, App. § 1630.2(i). The regulations contain an inexhaustive list of major life activities including "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Kirkingburg's amblyopia limits the major life activity of seeing. J.A. 35, 299-306.

Albertsons' proposed standard of "normal daily activities requiring eyesight" undermines the statutory framework as it relates to major life activities and is contrary to the essential purpose of the Act statute, which as the First Circuit has stated is "to protect individuals who have an underlying medical condition or other limiting impairment, but who are in fact fully capable of doing the job." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (CA1 1998); see also Brief of Amicus Curiae Justice For All, et al., at section I., discussing the purpose of the Act. When making the initial disability determination, it is essential to focus on, and not to stray from, the major life activity in question. Albertsons proposes a framework whereby to determine if an individual is substantially limited in a major life activity, one examines whether the individual's normal daily activities involving a major life activity are impacted, rather than whether the major life activity itself is impacted. Under Albertsons' framework, it becomes necessary to identify both a major life activity and

additional "normal daily activities." Albertsons fails to cite to the statute or its implementing regulations to support its argument. See Pet. Br. at 21-23. The statute only requires the impairment substantially limits *one* major life activity, no more. 42 U.S.C. § 12102(2)(A).

In holding reproduction was a major life activity, this Court stated that to be major, a life activity need not have a public, economic, or daily dimension. *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2205. Instead, "the touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Id.*, quoting *Bragdon*, 107 F.3d 934, 940 (CA1 1997). Focusing on normal daily activities, as Albertsons proposes, removes the element of significance which is fundamental to the definition of major life activity. The "major life activities" requirement refers to "basic activities," not necessarily routine or discretionary daily activities, the performance of which may be dependent upon personal choice. How one chooses to engage in a major life activity on a daily basis is simply not an aspect of the definition of disabled under the ADA. See *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2206. The proper inquiry in this case is whether and to what extent Kirkingburg's impairment restricts the major life activity of seeing itself. The Court need not also inquire how his limitation in seeing restricts additional normal daily activities, or how his impairment restricts other major life activities such as working.⁶

⁶Albertsons' focus on the major life activity of working is neither necessary nor proper. The Ninth Circuit did not address that issue. The EEOC Interpretive Guidance provides that the major life activity of working is only to be considered in cases where the individual is not substantially limited with respect to any other major life activity. 29 C.F.R. Pt. 1630, App. § 1630.2(j). The Interpretive Guidance provides the following example: "if an individual is blind, *i.e.*, substantially limited

C. Kirkingburg's Condition of Amblyopia Substantially Limits The Major Life Activity Of Seeing.⁷

An impairment is a disability only when it substantially limits a major life activity. 42 U.S.C. § 12102(2)(A). However, a substantial limitation does not mean an utter inability. *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2206. Instead, an impairment is substantially limiting if it either prevents a major life activity or "significantly restricts" it. 29 C.F.R. § 1630.2(j)(1). If an individual is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity," the individual is substantially limited with respect to that major life activity. 29 C.F.R. § 1630.2(j)(1)(ii). Thus, the analysis of whether an impairment is substantially limiting involves a consideration of differences. The Act does not cover all differences, but differences that amount to significant restrictions are covered. *Id.*

In this case, the condition and manner in which Kirkingburg sees are significantly restricted as compared to the

in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working." *Id.* Here, this Court need only address whether Kirkingburg's "seeing" is substantially limited.

⁷Because Albertsons did not raise the issue of whether Kirkingburg's amblyopia substantially limits a major life activity in the district court, the record on that issue is not as developed as it might otherwise be.

average person. Kirkingburg does not simply have low visual acuity; he has uncorrectable visual acuity in one eye of 20/200, meaning that in one eye he sees at 20 feet what those with unimpaired acuity see at 200 feet.⁸ Albertsons does not dispute that Kirkingburg's condition causes loss of peripheral vision. Pet. Br. at 6;⁹ see also, Frank B. Brady, *A Singular View—The Art of Seeing With One Eye*, (4th ed. 1988), pp. 26-27. As to near-distance depth perception, Kirkingburg is not only restricted, he is unable to perform the binocular stereopsis skill. See J.A. 300-301; von Noorden, *Binocular Vision and Ocular Motility, supra*, at 27. Thus, three primary aspects of vision – acuity, peripheral vision, and stereopsis, – are significantly restricted as compared to the average person.¹⁰

Most people see using two eyes. Kirkingburg sees using one eye. Kirkingburg sees not only in a fundamentally different manner than the average person but also in a

⁸ Daniel G. Vaughan, et al., *General Ophthalmology*, (Appleton & Lange, 14th ed. 1995), p. 32.

⁹ Albertsons' reference to loss of depth perception is more accurately labeled a loss of stereopsis. See von Noorden, *Binocular Vision and Ocular Motility, supra*, at 27; American Academy of Ophthalmology, *Pediatric Ophthalmology and Strabismus*, Basis and Clinical Science Course, 1998-1999 (1998) pp. 35-36 ("Stereopsis and depth perception should not be considered synonymous terms. Monocular clues contribute to depth perception.")

¹⁰ Primary visual functions tested in a basic ophthalmologic examination, include acuity, peripheral vision, and binocular function or alignment, which includes the stereopsis ability. Daniel G. Vaughan, et al., *General Ophthalmology*, (Appleton & Lange, 14th ed. 1995) pp. 31-34, referencing a chapter on "strabismus." See also, A.J. McKnight, et al., *The Visual and Driving Performance of Monocular and Binocular Heavy-Duty Truck Drivers*, 23 *Accid. Anal. & Prev.*, pp. 226-227 (1991) (examining the impact of certain aspects of vision on driving).

significantly restricted manner in that he has to function using one sensory organ to perform the major life activity of seeing while most people rely on two sensory organs to perform that activity. See generally B. Brady, *A Singular View*, *supra*. Functioning with two eyes allows an individual to appreciate short-distance depth based on stereopsis. Individuals with monocular vision do not have this ability to appreciate depth based on stereopsis. J.A. 300-301; von Noorden, *Binocular Vision and Ocular Motility*, *supra*, at 23-27. As a result of seeing using only one eye, the condition under which Kirkingburg sees is significantly restricted in that he is completely unable to use certain mechanisms, specifically retinal disparity and convergence, to sense short-distance depth perception as compared to those who use two eyes to see. *Id.*; see also, B. Brady, *A Singular View*, *supra*, at 27-32.

Humans have at their disposal two sets of cues for orientation in space. von Noorden, *Binocular Vision and Ocular Vision*, *supra*, at 29. Physiological cues provided by fusion of disparate retinal images afford the direct perception of spatial relation, *i.e.* binocular stereopsis. *Id.* at 29. The monocular cues to spatial localization are achieved on the basis of experience. *Id.* Thus, as an individual with monocular vision, Kirkingburg lacks the physiologically based cues necessary for direct perception of spatial relationship and must rely upon monocular cues developed through experience.

Although as an individual with monocular vision Kirkingburg is able to use some mechanisms for short-distance depth perception, *e.g.* accommodation, he has had to learn to develop and rely upon monocular cues such as relative motion and perspective to cope with his impairment. J.A. 300-306; see von Noorden, *Binocular Vision and Ocular Vision*, *supra*, at 27-29; B. Brady, *A Singular View*, *supra*, at 31-43.

"A person stereoblind since infancy must rely exclusively on monocular clues and will flawlessly perform most ordinary tasks requiring depth discrimination, such as pouring milk into a glass or parallel parking. He or she will fail abysmally, however, when a higher degree of stereopsis becomes essential and monocular clues are no longer available, for instance, as occurs in the limited field vision provided by an operating microscope."

von Noorden, *Binocular Vision and Ocular Motility*, *supra*, at 29. Kirkingburg not only sees *differently* than most others, his sight, in particular stereopsis ability, is significantly restricted because he essentially has only one eye with which to see.

How Kirkingburg performs his daily activities with his monocular vision is not an appropriate consideration in determining the initial question of whether he is disabled. Superimposing an additional requirement of establishing a substantial limitation of normal daily activities is not only inconsistent with the EEOC regulations, the requirement is inconsistent with the Act itself. According to the statutory language an individual is disabled if he or she has "a physical impairment that substantially limits *one or more* of the major life activities." 42 U.S.C. § 12102(2)(A) (emphasis added). Thus, it is sufficient in this case that one major life activity, "seeing," is significantly restricted "as to the condition, manner or duration under which it can be performed." 29 C.F.R. § 1630.2(j)(1)(ii).¹¹ Having established that primary

¹¹ Albertsons has offered no reason why the principles set forth in *Chevron*, *supra*, 467 U.S. at 843-844, 104 S.Ct. at 2782-2783, as employed in *Bragdon v. Abbott*, should not be followed regarding deference to this EEOC regulation regarding the substantially limited factor. Albertsons does not argue that the EEOC's regulations regarding

aspects of the major life activity of seeing are substantially limited, Kirkingburg need not also establish how that limitation in seeing prevents him from performing normal daily activities. Put another way, having established that he (a) is incapable of seeing in stereopsis, (b) has had to develop and rely upon monocular cues for depth perception, and (c) has a reduced field of vision, Kirkingburg need not also establish that his inability and restrictions limit his ability to do a variety of daily life activities. For example, Kirkingburg need not also establish he is limited in daily activities such as shaking hands, pouring liquid into a container, using stairways, or threading a needle. See B. Brady, *A Singular View*, *supra*, at 45-60 (discussing the "pitfalls" for individuals who recently or suddenly have monocular vision and how to develop skills and techniques to function despite the loss).

Having established that Kirkingburg's amblyopia substantially limits the major life activity of seeing, this Court need not address Albertsons' argument that monocular vision is *not* a *per se* disability under the ADA. *Bragdon*, *supra*, 524 U.S. at ---, 118 S.Ct. at 2207. However, should this Court choose to address the *per se* issue, it should find monocular vision is a disability *per se*. Given the science of vision, a monocular vision individual is inherently unable to use certain binocular vision mechanisms to sense near-distance depth

significant restrictions in condition or manner are arbitrary, capricious, or manifestly contrary to the statute, which, under *Chevron*, *supra*, would justify not deferring to the EEOC regulations. *Chevron*, *supra*, 467 U.S. at 843-844, 104 S.Ct. at 2782-2783. In *Bragdon*, this Court stated it draws guidance from the views of the agencies authorized to administer the ADA. 524 U.S. at ---, 118 S.Ct. at 2209. Albertsons offers no reason to stray from that principle in the application of the substantially limited factor and nor should this Court find one.

be disabled. Certain conditions are inherently substantially limiting. 29 C.F.R. Pt. 1630, App. § 1630.2(j).¹² Thus, monocular vision is a disability *per se* under the ADA.

Albertsons' application of its proposed standard demonstrates the standard's flaws. Pet. Br. 22-25. In essence, it muddles the analysis of major life activity and qualified individual with a disability. That Kirkingburg has had a long employment history and that he is able to drive do not determine the question of whether he is substantially limited in the major life activity of *seeing*. The definition of disability under the ADA is not job-specific. Job-specific considerations only come into play in determining whether one is otherwise qualified or substantially limited in the major life activity of working. In this case, Kirkingburg's ability to drive is relevant only to the issue of whether he is qualified for the position in question, not to whether he is disabled under the Act. If *driving* were the major life activity under consideration, then any limitations, or lack thereof, on his ability to drive would be relevant to the disability determination.¹³ However, here the

¹² The text and purpose of the ADA demonstrate that certain impairments are always disabilities. See Brief of Amicus Curiae Justice For All, et al. at section II. Impairments are not simply deemed to be disabilities *per se* under the Act. Rather, when the statutory framework is applied some impairments always substantially limit one or more major life activities and thus will always constitute a disability under the Act. *Id.*

¹³ Unfortunately, once a court strays from the disciplined analysis required under the Act, a flawed analysis such as that proposed by Albertsons is not uncommon. In *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (CA5 1997) the court noted the plaintiff's monocular vision limits his peripheral vision, which should have been the focus of the issue. However, the court then went on to hold his major life activity of seeing was not limited because he could drive and was a marksman. Likewise, in *Haldums v. Coca-Cola Bottling Co.*, 3 AD Cases 1202 (Tenn. Ct. App.

major life activity under consideration is seeing, which is sufficient to meet the threshold for protection under the Act. 42 U.S.C. § 12102(2).

Albertsons' proposed standard would force individuals to establish not only that a major life activity is significantly restricted but also that the individual is unable to perform the "normal daily activities" involving that major life activity. The proposed standard attempts to add a dysfunctional component to the definition of "disabled," rather than addressing functionality in the "otherwise qualified" analysis. This approach adds an additional significant barrier not supported by the statute, regulations, or legislative history. Albertsons' proposed standard would force individuals to establish they cannot function in daily life to a substantial degree in order to gain initial protection under the ADA, but then subsequently require them to establish they can function well enough to perform the essential functions of a particular job. Congress did not intend to create such a Catch-22. Instead, the very essence of the Act is to protect those who are able to function despite limitations caused by physical or mental impairments.

F.3d 50, 52 (CA5 1997) the court noted the plaintiff's monocular vision limits his peripheral vision, which should have been the focus of the issue. However, the court then went on to hold his major life activity of seeing was not limited because he could drive and was a marksman. Likewise, in *Haldums v. Coca-Cola Bottling Co.*, 3 AD Cases 1202 (Tenn. Ct. App. 1993) (applying Tennessee law based upon the Rehabilitation Act), the court noted the monocular visioned route manager was not substantially limited in a major life activity despite his inability to perform all occupational functions that require close-up depth perception such as a surgeon or jeweler. The court disregarded the limitation to seeing and held the individual was not disabled because there were numerous other jobs he could perform. *Id.* at 1204. Again, the court erred when it went beyond the major life activity of seeing to examine additional major life activities.

Arnold, supra, 136 F.3d at 861, citing numerous subsections of 42 U.S.C. § 12101; see 42 U.S.C. § 12101(8) (purpose of statute is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities); *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2206 (one may be substantially limited "even if the difficulties are not insurmountable").

Significantly, Albertsons does not offer any reason why this Court should reject the EEOC's regulatory guidance followed by the Ninth Circuit. Clearly Kirkingburg sees in a "manner" that is significantly restricted compared to an average person. He can only use one eye to see instead of two and cannot perform vision functions, such as stereopsis, that require two eyes. That Kirkingburg is able to see well enough to drive is due to his development of the use of monocular cues. J.A. 299-306. Such self-accommodation does not negate the limiting nature of his impairment. *Bartlett v. New York Bd. of Law Examiners*, 156 F.3d 321, 329 (CA2 1998) (an individual's ability to self-accommodate for her reading disorder does not foreclose a finding of disability); 29 C.F.R. pt. 1630, App. § 1630.2(j) (mitigating factors are not to be considered when accessing the disabled status of a individual); *Arnold, supra*, 136 F.3d at 859-863. It is Kirkingburg's lifelong development of mechanisms to cope with his vision limitation (J.A. 305-306) that in part establishes Kirkingburg's sight is significantly restricted in manner and condition compared to the average person. According to the EEOC regulations that should be sufficient to be protected under the Act. 29 C.F.R. § 1630.2(j)(1)(ii).

The Eighth Circuit's analysis in *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (CA8), cert. denied, 524 U.S. ---, 118 S.Ct. 693 (1998) of whether a monocular vision individual is substantially limited in seeing despite the

individual's ability to adjust and make mental adaptations presents a sound analysis of the issue. After examining the actual medical effect of monocular vision on a person's major life activity of seeing, including lack of three dimensional near-distance depth perception and loss of peripheral vision, the Court held that the individual was disabled despite that "his brain has learned to work with environmental clues to develop his own sense of depth perception using only one eye and that he has learned to compensate for his loss of peripheral vision by adjusting his head position." 115 F.3d at 627.

The Ninth Circuit correctly followed the Eighth Circuit's reasoning. As opposed to the Fifth Circuit's ruling in *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (CA5 1997), *Doane* is the more thorough and better reasoned opinion and is more consistent with the Act and Congress' intent. See H.R. Rep. No. 101-485, 101st Cong., 2d Sess., pt. 2, p. 52 (1990) (House Education and Labor Committee), reprinted in 1990 U.S.C.C.A.N. 303, 334 (hereinafter "House Report, pt. 2") (an individual is substantially limited when major life activities are restricted as to condition, manner, or duration and that assessment is to be made without regard to mitigating factors); see *Coleman v. Southern Pacific Transp. Co.*, 997 F.Supp. 1197, 1202-1203 (D. Ariz. 1998) (comparing the analysis in *Doane*, *supra*, to that used by the Fifth Circuit in *Still*, *supra*, and finding *Doane* to be better reasoned and more persuasive).

II. Albertsons Regarded Kirkingburg As Substantially Limited In The Major Life Activities Of Seeing And Working.

An additional and independent basis for affirming the Ninth Circuit decision is that a genuine issue of fact exists as to whether Albertsons regarded Kirkingburg as disabled.

Albertsons did not include within the three questions presented in its Petition for Certiorari the issue of perceived disability, although that was an "alternative ground" for the Ninth Circuit's decision in this case. J.A. 236-237. In its brief on the merits, Albertsons nevertheless raises the perceived disability issue, even though the original question presented simply addressed whether amblyopia is a disability *per se*. Since certiorari was granted on the *per se* issue, this Court need not, and indeed should not, consider the perceived disability issue. *Blessing*, *supra*, 520 U.S. at 340 n.3, 117 S.Ct. at 1359 n. 3; *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 2445-2446 (1995); Sup. Ct. Rule 14.1(a). Nevertheless, should this Court decide to consider the perceived disability issue, Respondent will address the merits of that issue.

Under the third prong of the definition of disability, the ADA provides that even an individual without a disability who is regarded by an employer as having an impairment that substantially limits a major life activity is an individual with a disability. 42 U.S.C. § 12102(2)(C); 29 C.F.R. Pt. 1630, App. § 1630.2(1).

Here, even if Kirkingburg were not substantially limited in a major life activity, the evidence raises a genuine question of material fact as to whether Albertsons considered his vision impairment to substantially limit the major life activity of seeing. Mr. Riddle referred to Kirkingburg as "legally blind or blind in one eye." J.A. 339, 341. However, the documentation available to Albertsons at the time established he was not blind and did not label him "legally blind." J.A. 357. Indeed, on appeal Albertsons conceded Kirkingburg's combined acuity was never legally blind. J.A. 185. According to precedent established under the Rehabilitation Act, perceiving someone to be legally blind or

blind would constitute regarding them as substantially limited in the major life activity of seeing. See *Norcross v. Sneed*, 573 F.Supp. 533, 536 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (CA8 1985) (legally blind individual is handicapped); *Gurmankin v. Costanzo*, 411 F.Supp. 982, 989 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (CA3 1977) (blind person is handicapped).¹⁴ Since the ADA is to provide as broad protection as the Rehabilitation Act, 42 U.S.C. § 12201(a), Mr. Riddle's comment raises a genuine issue of material fact as to whether Albertsons perceived Kirkingburg as disabled in the major life activity of seeing.

Albertsons' decision to terminate Kirkingburg as a result of his vision impairment and thus treat him as unable to perform any of its jobs, including all those involving driving, is evidence Albertsons treated Kirkingburg as substantially limited in the major life activity of working. In reference to the first definition of disability, the EEOC has stated: "An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes. . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(j). However, in explanation of the "regarded as" definition of disability the EEOC explains an individual "rejected from a job" may be covered by the Act, where he or she is rejected because of the prejudices and misconceptions associated with disabilities. 29 C.F.R. Pt. 1630, App. § 1630.2(1). Thus, under the "regarded as" prong, where an individual does not assert any limitations, an

¹⁴ Although these Rehabilitation Act cases involved individuals with binocular impairment, it is unclear from Mr. Riddle's comment whether he perceived Kirkingburg to be legally blind, as in *Norcross*, or only legally blind in one eye. In either case, as demonstrated above, perceiving Kirkingburg to be blind in one eye would be sufficient, since monocular vision substantially limits seeing.

employer regards the individual as substantially limited in the major life activity of working when the employer terminates the individual's employment due to a perceived impairment, as defined under the Act. 29 C.F.R. § 1630.2(1).

As described in lower courts the proper standard to employ in the context of perceived disability cases involving the major life activity of working is the employer's foreclosure of "the type of employment involved, not the range of job tasks." See, e.g., *Forrisi v. Bowen*, 794 F.2d 931, 935 (CA4 1986); *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 913 (CA11 1996), *cert. denied*, 524 U.S. ---, 118 S.Ct. 630 (1997). Albertsons foreclosed the type of employment involved when it terminated Kirkingburg as a driver and refused to consider other employment alternatives prior to his termination. *Best v. Shell Oil Co.*, 107 F.3d 544, 548 (CA7 1997) (a trier of fact could find that the employer perceived truck driver with a knee injury "as having a disability that prevented him from working as a truck driver for the company").

Albertsons argues that its offer of the tireman position, long after it terminated Kirkingburg, establishes as a matter of law that it did not regard Kirkingburg as substantially limited in a class or broad range of jobs. Pet. Br. at 26-27. Albertsons misapplies the single position analysis to the issue of working. This is not a case where the employer excluded the individual only from certain of its positions due to limitations asserted by the individual. Thus, *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (CA9 1997) and *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (CA5 1998) are readily distinguishable since in each the plaintiff asserted physical limitations. Here, in the absence of any medical restrictions being asserted by Kirkingburg, Albertsons unilaterally disqualified Kirkingburg from all driving jobs, including the

yard hostler job. Thus, in Albertsons' corporate mind, Kirkingburg was unable to perform the entire class of jobs involving driving, not just one driving position.

Albertsons' eventual offer of the tireman position is too late and too distinctively different a type of job to be determinative. Albertsons did not consider any alternative job between November 6, 1992, when for the first time it treated Kirkingburg's vision impairment as substantially limiting his ability to see and work, and November 20, 1992 when it terminated him. Albertsons' lack of consideration of alternative employment is evidence Albertsons regarded Kirkingburg as unable to work at all at the time it terminated him. Albertsons' tardy action after the termination cannot as a matter of law insulate it from liability for previously terminating Kirkingburg's employment.

Albertsons' argument that its perception of Kirkingburg must be based upon "myths, fears, or stereotypes associated with disabilities" is too narrow a reading of the "regarded as" definition of disability. Pet. Br. at 25-26. The EEOC's Regulations and Interpretive Guidance clarify that even an innocent misconception of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability. *Deane v. Pocono Medical Center*, 142 F.3d 138, 144 (CA3 1998). Moreover, the EEOC has explained that common attitudinal barriers, including concerns over "safety, insurance, [and] liability," frequently result in employers excluding individuals with otherwise non-disabling impairments. 29 C.F.R. pt. 1630, App. § 1630.2(l). Here, Albertsons asserts its decision was based on its concern about safety, but there is evidence the concern was about liability. J.A. 174-175, 347. The success of the DOT vision waiver program and scientific studies available at the time, and subsequently, demonstrate those fears about safety were

unfounded.¹⁵ Discrimination based upon such exaggerated and unfounded fears is "precisely the type of injury Congress sought to prevent[,]" with the regarded as prong. *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 285, 107 S.Ct. 1123, 1130 (1987).

III. Kirkingburg Is A Qualified Individual With A Disability.

Under the ADA, in order to establish that an individual is protected, the individual must show that he or she suffers from a disability and is a "qualified individual." 42 U.S.C. § 12112(a). A "qualified individual" is an individual who (1) "satisfies the requisite skill, experience, education and other job related requirements" of the employment position in question, and (2) "who, with or without reasonable accommodation, can perform the essential functions" of the position. 29 C.F.R. § 1630.2(m). The EEOC regulations define "essential functions" to mean "the fundamental job duties of the employment position. . . ." 29 C.F.R. § 1630.2(n)(1).

The EEOC's Interpretive Guidance suggests a two step analysis for determining whether an individual is qualified: (1)

¹⁵ The statistics gathered from the waiver program indicate the drivers with waivers performed "more safely than those drivers in the general population of commercial drivers." 59 Fed. Reg. 59386, 59389 (1994); see also, e.g., A.J. McKnight, et al., *The Visual And Driving Performance of Monocular and Binocular Heavy-Duty Truck Drivers*, 23 *Accid. Anal. & Prev.*, pp. 225-237 (1991) ("It was concluded that monocular drivers have some significant reductions in selected visual capabilities and in certain driving functions dependent on these abilities, compared with binocular drivers. However, monocular drivers are not significantly worse than binocular drivers in the safety of most day-to-day driving functions.")

whether the individual satisfies the prerequisites for the position; and (2) whether or not the individual can perform the essential functions of the position, with or without reasonable accommodation. 29 C.F.R. Pt. 1630, App. § 1630.2(m). In this case, the heart of the issue is whether Albertsons can, as a matter of law, insist that the DOT standard minimum vision requirements for DOT certification be met and refuse to accept a DOT waiver of those vision requirements as part of the prerequisites of the job of commercial truck driver on the mere assertion of a safety concern. The Ninth Circuit correctly held, that on this record, Albertsons cannot require such a prerequisite.

A. Kirkingburg Can Perform The Essential Functions Of A Commercial Truck Driver.

Albertsons admits that “[d]riving trucks in interstate commerce is the sole function of this position.” Pet. Br. at 36. Thus, by definition driving is the essential function of the position. Kirkingburg produced unrefuted evidence that he successfully performed that sole essential function for Albertsons from August 21, 1990 through December 3, 1991 (J.A. 312, 316, 344), and had satisfactorily performed similar truck driving jobs for 11 or more years before his employment, without being involved in an accident that was his fault. J.A. 11, 289-290, 295-296. Albertsons itself tested Kirkingburg’s driving ability and certified that he “possesses sufficient driving skill to operate safely” a commercial truck. J.A. 358. Based upon Kirkingburg’s demonstrated history of his ability to successfully drive a commercial truck, with his amblyopia, a reasonable juror could conclude he could perform the sole essential function of the truck driving position. *Doane v. City of Omaha*, *supra*, 115 F.3d at 628 (plaintiff’s prior successful

job performance in position in question creates question of fact for jury).

B. Kirkingburg Produced Evidence That He Possessed The Prerequisites Of The Truck Driving Position, Including DOT Certification Through The Vision Waiver Program.

Whether a person satisfies the prerequisites for a position is determined by assessing whether the individual possesses “the appropriate educational background, employment experience, skills, licenses, etc.” 29 C.F.R. Pt. 1630, App. § 1630.2(m). As the EEOC elaborated in its Technical Assistance Manual, necessary prerequisites may include: “education, work experience, training, skills, licenses, certificates, and other job related requirements, such as good judgment or ability to work with others.” EEOC: Technical Assistance On Title I of ADA § 2.3, *reprinted in* 8 Fair Employment Practices (BNA) 405:6981, at 405:6993 (hereinafter “EEOC Technical Assistance Manual”).

Here, Kirkingburg produced evidence that he possessed the necessary employment experience, he had years of driving experience, with only one accident which was determined not to be his fault. J.A. 11, 289-290, 295-296. To the extent an educational background was required, he had obtained an associate degree. J.A. 272. Albertsons itself certified he possessed the necessary “skills,” to drive “safely” after an 18-mile driving test. J.A. 358. He had no license suspension or disqualifying moving violations on his record. J.A. 295-296, 347-348, 355. According to his doctor of optometry, the amblyopia in his left eye does not interfere with his ability to drive. J.A. 35-36. Kirkingburg possessed the appropriate

"licenses" and/or "certificates" for he either held a valid DOT card or later obtained a FHWA vision waiver and such a card. J.A. 278-279, 345-346, 361. Kirkingburg was allowed to drive while certified despite not meeting the DOT minimum requirements. Therefore, Kirkingburg produced evidence from which a reasonable juror could find he satisfied the legitimate prerequisites of the job.

C. Albertsons Cannot Arbitrarily Choose Which DOT Standards It Will Apply Or Reject Based Upon A Generalized Safety Fear In The Absence Of An Individualized Assessment Of The Alleged Safety Risk, When The Rejected Standards Were Adopted To Comply With The ADA.

Albertsons argues it can require the DOT regular minimum vision standards be met as a legitimate job prerequisite and failure to meet those standards prevents an individual from performing the essential job function of driving a truck for Albertsons, because Albertsons will not allow such a driver to drive, even though the DOT will. Albertsons' argument relies too heavily upon the ADA's allowance for business judgment and a strained application of a district court case, *Campbell v. Federal Express Corp.*, 918 F.Supp. 912 (D. Md. 1996).

Although the ADA allows for business judgment, an entity's business judgment is not absolute and does not apply to all prerequisites. When as here the business judgment is to rely upon one set of DOT standards and refuse to accept a

DOT program designed to comply with the ADA,¹⁶ it is not enough for Albertsons to assert it is exercising its business judgment regarding safety, when there is no evidence in the record of any individual assessment, or objective medical evidence, to support the presence of such a safety risk. See section IV., *infra*.

As the EEOC explains: "The Act does not interfere with an employer's authority to establish appropriate job qualifications. . .[.]" however, qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of the disability "must be job related and consistent with business necessity." EEOC Technical Assistance Manual at § 4.1, *reprinted in* 8 FEP at 405:7018. To be job-related and consistent with business necessity the selection criteria must be "a legitimate measure or qualification for the specific job it is being used for," not a class of jobs, and it must relate to an essential function of the job. *Id.* at § 4.3. "A standard may be job related but not justified by business necessity, because it does not concern an essential function of a job." *Id.* at § 4.3(2).

Here, the legitimate job-related qualification for the specific job in question was DOT certification, which Kirkingburg obtained through the FHWA vision waiver program. Any additional minimum vision requirement which screens out on the basis of disability an entire class of individuals without individual assessment is not a legitimate

¹⁶ The FHWA's establishment of the vision waiver program was consistent with Congress' desire and "expect[ation] that the DOT would make the necessary changes to its regulations in order to end unwarranted discrimination against the disabled." *Rauenhorst v. U.S. Department of Transportation*, 95 F.3d 715, 717 (CA8 1996), *quoting* the relevant legislative history, *citing to* House Report, pt. 2, at 57, *reprinted in* 1990 U.S.C.C.A.N. at 339.

prerequisite and therefore does not legitimately concern the essential function of truck driving, since the FHWA vision waiver program establishes that where a waiver is granted the requirements of that function as to vision are met. J.A. 381-382. Just as this Court noted in *Arline*, while deference should be given to the judgments of public health officials as to whether a person is qualified in the context of a contagious disease, *Arline*, 480 U.S. at 288, 107 S.Ct. at 1131, so also should deference be given to the public agency that authorized Kirkingburg to drive a commercial truck in interstate commerce.

As the EEOC warns regarding "blanket" exclusions by "standards that exclude an entire class of individuals with disabilities," although the employer may believe such standards are necessary for safety reasons, "in most cases they will not meet ADA requirements" because an employer's legitimate concerns of safety must be addressed through an "objective assessment of a particular individual's current ability" to perform the job in question safely. EEOC Technical Assistance Manual, § 4.4, *reprinted in* 8 FEP at 405:7023. Thus, any business judgment regarding safety cannot be applied in a blanket fashion as Albertsons did here, because the DOT determined Kirkingburg to be a safe driver through the vision waiver program, 57 Fed. Reg. 31458, 31459 (1992), and to the extent Albertsons performed any individual risk assessment, it had previously found Kirkingburg to be a safe driver. J.A. 358.

Albertsons is correct to the extent it argues the ADA does not require it to lower its qualitative standards as those standards relate to production standards. Pet. Br. at 32-33. However, this case does not involve production standards. *Compare, Milton v. Scrivner*, 53 F.3d 1118 (CA10 1995) (employer not required to lower universally applied production

schedule for disabled grocery selector position).

Likewise, Albertsons' reliance on *Campbell, supra*, is misplaced because that case held the plaintiff was required to exhaust DOT administrative remedies before suing under the ADA. Notably, in *Campbell* the plaintiff did not apply for a waiver of the DOT regulations. Thus, *Campbell* is inapposite, since here Kirkingburg sought and obtained a waiver, but Albertsons refused to accept it.

The essence of Albertsons' position is that as an employer it has the right to exercise its business judgment and to adopt the regular DOT vision standards as its own and to refuse to accept the FHWA vision waivers because of its concern for safety. Pet. Br. at 33-35. A fundamental flaw in Albertsons' position is that an employer's business judgment is not absolute. The ADA requires that a disabled person not be discriminated against due to his vision disability when the individual has obtained the requisite DOT certification and demonstrated he can perform the essential function of safely driving a commercial truck. The goal of the waiver program was to "obtain sufficient empirical data, which, when analyzed, will provide a reliable basis for establishing visual requirements that are consistent with the goals of safety, yet provide maximum employment opportunity for those persons covered under the [ADA] and the Rehabilitation Act of 1973." 57 Fed. Reg. 10295 (March 1992). When as here, Albertsons asserts a blanket qualification standard that disqualifies individuals due to a disability based upon safety fears, it must conduct an individual assessment. 29 C.F.R. § 1630.2(r). To allow Albertsons to reject the DOT's compliance with the ADA by simply asserting a general safety concern is precisely the kind of discrimination the Act was meant to protect against. House Report, pt. 2, at 58, *reprinted in* 1990 U.S.C.C.A.N. at 340. ("It would also be a violation to deny

employment to an applicant based on generalized fears about the safety of the applicant. . . .").

Ultimately, Albertsons' business judgment must comply with federal law. By refusing to accept the FHWA waivers as satisfying the position's legitimate prerequisites Albertsons took the position it could choose to follow one set of DOT regulations and reject the DOT's program to bring those regulations into compliance with the ADA. See *Rauenhorst, supra*, 95 F.3d at 716-717. Albertsons' business judgment should not trump the federal agency's efforts to revise its regulations to conform to the requirements of the ADA, as Congress directed it to do. House Report, pt. 2, at 57, reprinted in 1990 U.S.C.C.A.N. at 339 (DOT expected to make necessary changes to bring regulations into compliance). Had Albertsons wanted to challenge the validity of the FHWA waivers it could have challenged them directly. See *Carpenter v. Department of Transp.*, 13 F.3d 313, 314-315 (CA9 1994); see also, *Advocates for Highway and Auto Safety v. FHWA*, 28 F.2d 1288 (CA DC 1994). In the absence of a judicial challenge, Albertsons could have devised and conducted an individual assessment of the supposed safety risk posed by Kirkingburg and similarly situated drivers by which it claims to have been guided. In the absence of either action, Albertsons should not be able to use its generalized fear of a safety risk or liability to pick and choose with which DOT regulations and programs it will choose to comply. The Ninth Circuit correctly held Albertsons could not choose to adhere to only part of the DOT regulations, while refusing to disregard the FHWA waiver due to generalized safety concerns.¹⁷

¹⁷ Albertsons' attempt to color the issue by consistently referring to the vision waiver program as "experimental" does not alter the above analysis. The DOT does not refer to the program as experimental. After

IV. There Is No Objective Evidence In The Record That Kirkingburg Posed A Direct Safety Threat As A Truck Driver Due To His Vision Impairment.

The ADA allows employers to assert, as a defense, that an individual poses a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. § 12113(a), (b). Direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). As an affirmative defense, the employer bears the burden of proving the employee poses a direct threat. *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 764 (CA5 1994). Whether an individual poses a direct threat when doing a particular act is a fact-intensive question. *Id.*

A slightly increased risk is not sufficient to establish that a condition poses a direct threat. 29 C.F.R. Pt. 1630, App. § 1630.2(r). Significant risks, as required by the Act, are those which pose a high probability of substantial harm. *Id.* "[A] speculative or remote risk is insufficient." *Id.*; see also, House Report, pt. 2, at 56, reprinted in 1990 U.S.C.C.A.N. at 338.

Although determining whether a significant risk of

the vision waiver program was vacated by the D.C. Circuit in *Advocates For Highway and Auto Safety, supra*, 28 F.3d at 1289, on remand the agency determined it could safely continue the program for those already in it. 59 Fed. Reg. 59386, 59387 (1994). That program continues to grant waivers to the present. See 63 Fed. Reg. 54519 (Oct. 1998) (waivers granted to 12 individuals). Indeed, the Eighth Circuit has ordered monocular vision individuals be allowed to apply for vision waivers and be individually assessed, even though the stated application period previously ended. *Rauenhorst, supra*, 95 F.3d at 723; 63 Fed. Reg. 1524, 1527 (1998) (*Rauenhorst* granted a vision waiver). Albertsons' "experimental" argument was not raised at the time it refused to accept the waiver; it should not be persuasive now.

harm exists is made from the employer's standpoint, the employer's assessment cannot be based on its own subjective belief of risk, even if it is in good faith. *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2210. Nor can an employer rely on "irrational fears, patronizing attitudes, or stereotypes . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(r). Instead, the assessment of whether an individual with a disability poses a significant risk of harm must be based on objective scientific information. *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2210.

In this case, at the time of its decision to terminate Kirkingburg, Albertsons had no objective evidence that Kirkingburg posed a significant risk to the health or safety of himself, others, or even property. Indeed, in its brief, Albertsons does not identify any objective evidence in the record that indicates Kirkingburg posed a direct safety threat when driving. Albertsons notes that it had evidence from a doctor that Kirkingburg was "below minimum DOT safety regulations." Pet. Br. at 40. However, that was the same doctor, or his nurse, who told Kirkingburg to get a vision waiver. J.A. 284. Albertsons had no medical evidence that Kirkingburg's vision created a significant risk of harm; it had let him drive before with vision that did not meet the minimum standards.

The Interpretive Guidance suggests evidence that may be relevant to the direct threat determination, including "input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors [or others] who have expertise in the disability involved and/or direct knowledge of the individual with the disability." 29 C.F.R. Pt. 1630, App. § 1630.2(r). The evidence must relate to the specific individual's present ability to perform the job and not generalized assumptions about the nature or effect of a

disability. EEOC Technical Assistance Manual § 4.5(4), reprinted in 8 FEP at 405:7023; House Report, pt. 2, at 56, reprinted in 1990 U.S.C.C.A.N. at 338. Indeed, the requirement for individualized assessments under the ADA was one of the reasons for the FHWA vision waiver program. 57 Fed. Reg. 10295 (March 1992); 57 Fed. Reg. 23370, 23371 (June 1992); 57 Fed. Reg. 31457, 31459 (July 1992).

Albertsons did have direct knowledge of Kirkingburg and his ability to drive safely. In reviewing his 18-mile road test, Albertsons' transportation manager certified Kirkingburg "possess[ed] sufficient driving skill to safely" operate a commercial motor vehicle. J.A. 358. Kirkingburg's experience in similar positions demonstrates he was not a direct threat. He had held professional driving positions before Albertsons and had an impeccable driving record. J.A. 11, 289-290, 295-296. In its files, Albertsons had Kirkingburg's previous certification exam reports which for 1990 reported a corrected vision of 20/70 in his left eye and for 1991 reported a corrected vision of 20/100 in his left eye. J.A. 360-361. Albertsons allowed Kirkingburg to drive with his vision condition; the reports raised no "red flags" at the time. J.A. 293, 341-343, 344-345, 346-347, 349-350. The doctor's report which went to Albertsons stated that Kirkingburg's 20/200 vision in his left eye was "since birth," indicating Kirkingburg's vision was not worsening but had remained constant. J.A. 357. To the extent opinions of eye doctors with direct knowledge of Kirkingburg's disability were available, his treating eye doctor's opinion was that his "amblyopia in the left eye will not interfere with his ability to drive." J.A. 35-36. The FHWA had determined monocular vision drivers with safe driving records such as Kirkingburg were safe to drive. 57 Fed. Reg. 23370, 23371 (1992). Thus, the objective evidence available to Albertsons at the time it terminated Kirkingburg

did not establish he posed a direct safety threat. To the contrary, the evidence indicated Kirkingburg could continue to safely drive with his lifelong vision condition.

Albertsons' direct safety threat argument also fails because in terminating Kirkingburg due to his visual impairment, it made no individualized assessment of the risk as required by the ADA. 29 C.F.R. § 1630.2(r); *E.E.O.C. v. Union Pacific R.R.*, 6 F.Supp.2d 1135, 1138 (D.Idaho 1998) (failing to conduct individualized assessment of whether monocular visioned driver posed direct safety threat precluded employer's direct threat defense). Even when faced with a perceived safety risk, "an individualized assessment of the individual's present ability to safely perform the essential functions of the job" is necessary to establish an employee poses a direct safety threat. 29 C.F.R. § 1630.2(r). Individualized assessments prevent an employer from making judgments based on unfair and inaccurate stereotypes. *Bombrys v. City of Toledo*, 849 F.Supp. 1210, 1219 (N.D. Ohio 1993). Albertsons' decision to terminate Kirkingburg was based solely on his vision and his need for a vision waiver, not on an individual assessment of his present ability to perform the essential functions of the job safely. Except for being informed that Kirkingburg needed to obtain recertification through the vision waiver program, there was no other information from which Albertsons could conclude Kirkingburg was no longer able to safely perform the job he had been performing for Albertsons. Albertsons did not perform an individual assessment. The FHWA made the individual assessment of Kirkingburg's ability and found him to be a safe driver that it authorized to drive through the vision waiver program. J.A. 379-384; 57 Fed. Reg. 31457, 31459 (1992).

The Ninth Circuit correctly held that based upon the purpose and requirements of the vision waiver program, the FHWA determined Kirkingburg was a safe driver. That determination precludes Albertsons from declaring that the standard minimum vision requirements must be met to eliminate a direct safety threat. J.A. 246-248. Although Albertsons could have conducted an individual assessment to determine whether Kirkingburg posed a direct safety threat, it did not.

V. Albertsons Failed To Reasonably Accommodate Kirkingburg's Disability.

The ADA imposes an affirmative obligation on the employer to reasonably accommodate individuals with disabilities. 42 U.S.C. § 12112(b)(5)(A). Thus, Albertsons had an obligation to provide reasonable accommodation to Kirkingburg prior to terminating him on November 20, 1992. Any accommodations offered after the termination cannot relieve Albertsons' liability for the unlawful termination.¹⁸

¹⁸ For the first time in this case, Albertsons argues that an individual regarded as disabled is not entitled to any reasonable accommodation. Pet. Br. at 48. Nothing in the statutory language requires such an interpretation. Because it has not been raised before it should not be addressed at this time.

One category of reasonable accommodation consists of "accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities." 29 C.F.R. pt. 1630, App. § 1630.2(o). Thus, in a perceived disability claim the employer's obligation is to remove whatever barriers exist as a result of its misconceptions. Furthermore, should this Court agree with the Ninth Circuit and find Kirkingburg is disabled under the first prong of the ADA's definition of "disabled," then there is no need to decide the question of whether he is entitled to a reasonable accommodation under the "regarded as" prong.

In general, reasonable accommodations are modifications or adjustments that enable an employee to perform the essential functions of the job. 29 C.F.R. § 1630.2(o). Reasonable accommodations are designed to "reduce or eliminate unnecessary barriers between the individual's abilities and the requirements for performing the essential job functions." EEOC Technical Assistance Manual § 4.5(4), *reprinted in* 8 FEP at 405:6999. In this regard, the ADA differs from other federal discrimination statutes, such as Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, in that it, in appropriate circumstances, will require a "change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. Pt. 1630, App. § 1630.2(o). Possible reasonable accommodations under the Act include, but are not limited to, job restructuring, modified work schedules, *reassignment*, and *adjustment or modifications of policies*. 42 U.S.C. § 12111(9)(B) (emphasis added). An employer must make reasonable accommodations for an otherwise qualified individual unless it can demonstrate the accommodation would impose an undue hardship on the employer's business. 42 U.S.C. § 12112(b)(5)(A). Undue hardship is defined as "an action requiring significant difficulty or expense" 42 U.S.C. § 12111(10)(A).

The determination of whether an accommodation is appropriate is fact-specific and should be made on a case-by-case basis. House Report, pt. 2, at 62, *reprinted in* 1990 U.S.C.C.A.N. at 344. A leave of absence may be a reasonable accommodation under the ADA, where following the leave the

Bragdon, supra, 524 U.S. at ---, 118 S.Ct. at 2201.

employee is able to perform his duties. *Schmidt v. Safeway, Inc.*, 864 F.Supp. 991, 996 (D.Or. 1994) (leave of absence to obtain treatment for alcoholism where treatment was likely to be successful was reasonable accommodation as a matter of law). In this case, having DOT certification was a prerequisite of the job. In November 1992, Kirkingburg could obtain DOT certification through receipt of a FHWA vision waiver. Albertsons failed to reasonably accommodate Kirkingburg by refusing to provide him with a short leave of absence or other form of job restructuring in order to obtain the vision waiver.

At the time Kirkingburg was informed he needed to obtain a waiver, he had a good driving record and possessed all the qualifications necessary to obtain a FHWA waiver. Kirkingburg began the waiver application process prior to being notified of his termination. J.A. 367. The DOT required the employer to provide certain of the information necessary to obtain the waiver, but Albertsons refused to assist Kirkingburg in obtaining the waiver. J.A. 145, 325-326, 367-370.

Even if Albertsons did not have an obligation to allow Kirkingburg a leave of absence to obtain a vision waiver, it could have accommodated him prior to terminating him through reassignment to a vacant position. 42 U.S.C. § 12111(9). Albertsons' assertion that reassignment when an individual cannot be reasonably accommodated in his or her current position goes beyond the mandate of an employer's obligations ignores the plain language of the statute: "'reasonable accommodation' may include . . . reassignment to a vacant position." 42 U.S.C. § 12111(9). The Interpretive Guidance notes that the employer's obligation of reassignment applies only to current employees, and does not extend to applicants. 29 C.F.R. Pt. 1630, App. § 1630.2(o). Generally, reassignment only needs to be considered "when an accommodation is not possible in an employee's present job, or when an accommodation in the employee's present job

would cause an undue hardship." EEOC Technical Assistance Manual § 4.5(4), *reprinted in* 8 FEP at 405:7011. Here, Kirkingburg was *qualified* to perform the essential function of the job--driving. Therefore, he was entitled to reasonable accommodation, including reassignment. One form of reasonable accommodation would have been to temporarily transfer him to the yard hostler position in November. Albertsons allowed workers with license restrictions to work as a yard hostler position since the position did not require driving on the street. J.A. 324-325. There is evidence that prior to terminating Kirkingburg, Albertsons did not evaluate whether reassignment to a vacant position would be a reasonable accommodation. J.A. 309, 313-314, 339-340, 343.¹⁹

After terminating him, Albertsons offered Kirkingburg a job as a yard hostler but withdrew that position. J.A. 271, 277-280, 328. The only position Albertsons offered Kirkingburg that it did not withdraw was as a tireman. J.A. 280-281. For a reassignment to be a reasonable accommodation it must be "an equivalent position, in terms of pay, status, etc." 29 C.F.R. Pt. 1630, App. § 1630.2(o). A question of fact exists as to whether the offer of reassignment to tireman was reasonable or not because it was not equivalent in terms of pay and Kirkingburg had no experience in that type

¹⁹ In asserting it did not have to reasonably accommodate Kirkingburg, Albertsons attacks the validity of the FHWA waiver program, repeatedly referring to it as "experimental." However, as the Ninth Circuit noted, Albertsons failed to raise its "experimental" concerns at the time it refused to honor FHWA waivers. J.A. 243. While the waiver program was designed to study the existing vision requirements, it was also designed to maintain public safety. 57 Fed. Reg. 23370, 23371 (June 1992).

of position. J.A. 280-282.²⁰

Albertsons' workers' compensation argument that finding an affirmative duty of reassignment to be included under the ADA's reasonable accommodation would convert the ADA into a form of a super workers' compensation statute is unpersuasive. Pet. Br. at 46-47. First, the statutory language speaks for itself in clear unambiguous terms, reassignment is a form of reasonable accommodation. 42 U.S.C. § 12111(9). Second, in this case, Albertsons had a separate and independent statutory obligation under the Oregon workers' compensation and employment laws to return Kirkingburg, as an injured worker, to his former position or to a vacant and suitable one if his position was not available. ORS 659.415; ORS 659.420. (See Appendix for text). Thus, given the possible combination of statutory duties, employers may at times have obligations greater than under one statute alone.

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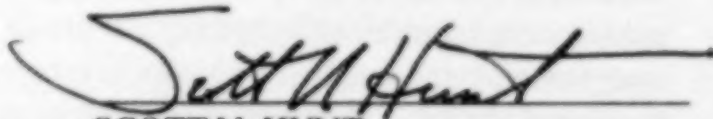
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²⁰ Albertsons' assertion that an employee cannot be allowed to reject position after position without relieving the employer of its obligation has no relevance to this case at summary judgment. While an employer may have fulfilled its obligation where it offers a reasonable accommodation that is rejected, that scenario simply did not occur here. Only after terminating Kirkingburg did Albertsons offer him two positions. It withdrew one of the offers, and the other was not a reasonable accommodation as it did not involve reassignment to an equivalent position.

CONCLUSION

For the foregoing reasons, Mr. Kirkingburg respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit in its entirety and remand this action for trial.

Respectfully submitted,



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APPENDIX

Relevant Federal Statutes

42 U.S.C. § 12102. Definitions

As used in this chapter:

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111. Definitions

As used in this subchapter:

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability

who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals

with disabilities.

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant

or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business

necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

Relevant Federal Regulations

29 C.F.R. § 1630.2 Definitions

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine;

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits*—(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not

substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(n) *Essential functions*—(1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modification or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment, as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring;

part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

Relevant State Statutes

ORS 659.415 Reinstatement of worker sustaining compensable injuries; certificate of physician evidencing ability to work; effect of collective bargaining agreement; termination of right to reinstatement; when reinstatement right terminates.

(1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. A worker's former position is "available" even if the position has been filled by a replacement while the injured worker was absent. If the former position is not available, the worker shall be reinstated in any other existing position which is vacant and suitable. A certificate by the attending physician that the physician approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties.

(2) Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

(3) Notwithstanding subsection (1) of this section:

(a) The right to reinstatement to the worker's former position under this section terminates when whichever of the following events first occurs:

(A) A medical determination by the attending physician or, after an appeal of such

determination to a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656, has been made that the worker cannot return to the former position of employment.

(B) The worker is eligible and participates in vocational assistance under ORS 656.340.

(C) The worker accepts suitable employment with another employer after becoming medically stationary.

(D) The worker refuses a bona fide offer from the employer of light duty or modified employment which is suitable prior to becoming medically stationary.

(E) Seven days from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician has released the worker for employment unless the worker requests reinstatement within that time period.

(F) Three years from the date of injury.

(b) The right to reinstatement under this section does not apply to:

(A) A worker hired on a temporary basis as a replacement for an injured worker.

(B) A seasonal worker employed to perform less than six months work in a calendar year.

(C) A worker whose employment at the time of injury resulted from referral from a hiring hall operating pursuant to a collective bargaining agreement.

(D) A worker whose employer employs 20 or fewer workers at the time of the worker's injury and at the time of the worker's demand for reinstatement.

(4) Any violation of this section is an unlawful employment practice.

ORS 659.420 Employment of injured worker in other available and suitable work; termination of right to reemployment; certificate of physician; effect of collective bargaining agreement.

(1) A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.

(2) A certificate of the worker's attending physician that the worker is able to perform described types of work shall be prima facie evidence of such ability.

(3) Notwithstanding subsection (1) of this section, the right to reemployment under this section terminates when whichever of the following events first occurs:

(a) The worker cannot return to reemployment at any position with the employer either by determination of the attending physician or upon appeal of that determination, by determination of a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656.

(b) The worker is eligible and participates in vocational assistance under ORS 656.340.

(c) The worker accepts suitable employment with another employer after becoming

medically stationary.

(d) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.

(e) Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician has released the worker for reemployment unless the worker requests reemployment within that time period.

(f) Three years elapse from the date of injury.

(4) Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

(5) Any violation of this section is an unlawful employment practice.

Supreme Court, U. S.
F I L E D

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(16)
No. 98-591

In the
Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Rule 29.1 Listing

Albertsons has no parent companies or nonwholly owned subsidiaries to list.

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SUMMARY OF REPLY ARGUMENT

Kirkingburg has no disability under the ADA. His major life activity of seeing is not significantly restricted, i.e., his overall vision functions almost as well as that of a binocular individual, and he was not regarded as being disabled by Albertsons. However, even if this Court holds that Kirkingburg is disabled, the Court also must find that Kirkingburg was qualified for the truck driver position in order for his ADA claim to proceed.

Kirkingburg is not a qualified individual under the ADA. He cannot perform an essential function (driving a truck in interstate commerce) of the employment position he held (truck driver for Albertsons).

Albertsons' qualification standard screened Kirkingburg out of his position. The standard dictated that any individual with less than 20/40 vision in each eye (corrected) could not drive a truck in interstate commerce. This standard is job-related and consistent with business necessity. It mirrors the same safety standard established by the DOT in 1970, which remains unchanged to this day.

Moreover, Kirkingburg posed a direct safety threat by driving a truck in interstate commerce. Albertsons is justified in following the minimum safety requirements established by the DOT (which also state that anyone with 20/40 vision in each eye should not drive a truck).

There is no reasonable accommodation which would allow Kirkingburg to attain 20/40 vision in his left eye and meet Albertsons' minimum safety standards. By obtaining an experimental vision waiver from the DOT, Kirkingburg did not come into compliance with Albertsons' qualification standards. He simply opted in to an experimental program designed to determine whether the DOT should lower the vision standards for truck drivers. It has not.

ARGUMENT

I. Kirkingburg Is Not Disabled

The ADA defines a disability as a physical impairment that substantially limits one or more of an individual's major life activities. 42 U.S.C. § 12102(2)(A). In this case, whether Kirkingburg's monocular vision is a physical impairment is not at issue. What is at issue is whether that physical impairment "substantially limits" Kirkingburg's major life activity of seeing.

There are some physical impairments that, by their very nature, are inherently substantially limiting. They include HIV, total blindness, total deafness, and paraplegia.¹ These and similar impairments are inherently substantially limiting because of the resulting functional impairments these conditions are characterized by and obviously cause.² As the EEOC recognizes, monocular vision is not one of those

¹ See 29 C.F.R. Pt. 1630 App. § 1630.2(j) (Interpretive Guidance) (discussing HIV infection as inherently substantially limiting). See also EEOC Compliance Manual § 902.4(c)(1), p. 902-21 (discussing the fact that in very rare circumstances, impairments are so severe that they substantially limit major life activities).

² This Court declined to find that asymptomatic HIV will always be a disability, but instead ruled that one specific woman was disabled because her ability to reproduce was substantially limited. *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 2207 (1998). In fact, if an individual is prepubescent, post-menopausal, or celibate (e.g., for religious reasons), query whether that individual would qualify for protection under the ADA on the ground that he or she is substantially limited in the major life activity of reproduction.

impairments.³

It is also well established, as expressed by this Court in *Bragdon v. Abbott*, that "substantially limited" does not mean utter inability. *Bragdon* at 2206 ("... the definition is met even if the difficulties are not insurmountable").

The overwhelming majority of impairments fall somewhere in between the extremes of complete ability and utter inability. For these impairments, it is necessary to analyze an individual's functions to measure the effect of the impairment on his or her life activities.⁴ The operation of the "substantially limited" prong necessitates investigation beyond a description, or naming, of the physical impairment and compels a functional analysis.

A. A functional analysis is necessary.

In order to determine whether Kirkingburg's major life activity of seeing⁵ is "substantially limited," it is

³ In its *Amicus Curiae* Brief, the EEOC states "[i]n any event, monocular vision is frequently a disability under the ADA, because it substantially limits both the amount (visual field) and the quality (ability to see in three dimensions) of an individual's major life activity of seeing" (EEOC Br., 7) (emphasis added); "[b]oth the amount that a monocular person sees and the quality of what such a person sees may be substantially less than that of an individual with binocular vision" (EEOC Br., 13) (emphasis added).

⁴ In fact, von Noorden (cited by Kirkingburg as an authority in the area of ophthalmology) essentially says that every person sees differently from every other person. Gunter K. von Noorden, *Binocular Vision and Ocular Motility, Theory and Management of Strabismus* at 29 (5th ed. 1996).

⁵ Kirkingburg makes no effort to establish, and apparently concedes, that he is not substantially limited in the major life activity of

necessary to examine the expected permanent or long term impact of Kirkingburg's vision impairment, in addition to the effects of the nature and duration of the impairment on Kirkingburg's life, to determine whether he is substantially limited in the major life activity of seeing. 29 C.F.R. § 1630.2(j)(2).

Kirkingburg asserts that he is substantially limited in the major life activity of seeing because he is (1) absolutely unable to perform stereopsis; (2) has suffered significant loss of acuity in one eye; and (3) has experienced an overall narrowing of his peripheral vision (Resp. Br., 11). Kirkingburg also asserts that he is significantly restricted as to the condition and manner in which he sees compared to the average person in the general population, because he must use one eye to do what most people use two eyes to do (Resp. Br., 21-22). In doing so, Kirkingburg simply describes monocularly; he names the condition he has.

Kirkingburg asserts that he is not required to establish that his limitation in sight substantially limits his ability to perform "some indeterminate number of his or some average individual's routine daily activities" (Resp. Br., 11). The EEOC *Amicus Curiae* Brief essentially agrees with Kirkingburg, that whether his monocular vision may not also limit other "normal daily activities" is of "no significance" (EEOC Br., 7).

This view is contrary to the EEOC's views as expressed in the EEOC Regulations⁶ as well as in the EEOC

working (Resp. Br., 19-20).

⁶ Determining whether an individual has a disability is "not necessarily based on the name or diagnosis of the impairment the person has, but rather the effect of that impairment on the life of the individual." 29 C.F.R. Pt. 1630, App. § 1630.2(j) (Interpretive Guidance).

Technical Assistance Manual, Compliance Manual and Enforcement Guidance. A survey of interpretive sources published by the EEOC supports conducting a functional analysis to determine whether Kirkingburg's impairment is substantially limiting.

The EEOC describes the required functional analysis as follows: "The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition." EEOC Enforcement Guidance on the Employment Provisions (Title I) of the Americans with Disabilities Act in Psychiatric Disabilities, § 915.002, p. 6 (March 25, 1997). Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work and in other settings, as well as evidence showing that the individual's functional limitations are linked to his or her impairment. *Id.*

EEOC investigators are also instructed that it is insufficient for an individual merely to state that the condition interferes with the ability to conduct a major life activity. EEOC Compliance Manual, § 915.002, at p. 902-22 (reissued Mar. 14, 1995). The individual should explain the extent of the interference, and should provide information regarding whether the condition prevents the individual from performing a major life activity at all, whether he or she can perform the major life activity under certain conditions, and whether the individual can perform the major life activity for short or long periods of time. *Id.*

The EEOC's Technical Assistance Manual provides "[the nature, duration and long term impact of the impairment] must be considered because, generally, it is not the name of an impairment or a condition that determines whether a person is protected by the ADA, but rather the

effect of an impairment or condition on the life of a particular person. * * * The determination as to whether an individual is substantially limited must always be based on the effect of an impairment on that individual's life activities." EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, § 2.1(a)(iii), p. II-4 (Jan. 1992) (emphasis in original).

In another source, the EEOC describes the functional test as follows: "In most cases a careful, case-by-case analysis is necessary to determine whether an impairment substantially limits any of a person's major life activities. This analysis focuses on the individual in question and analyzes whether the individual's impairment is substantially limiting for that individual." EEOC Compliance Manual, § 915.002, at p. 902-18 (reissued Mar. 14, 1995). The EEOC also describes medical documentation as "a good starting point" for determining the extent to which a physical or mental impairment limits an individual's major life activities. *Id.* at p. 902-21. In this case, both Kirkingburg and the EEOC urge the Court to end its analysis there (Resp. Br., 11; EEOC Br., 7).⁷

⁷ Not surprisingly, many courts have embraced a functional analysis in determining whether an individual is substantially limited in performing a major life activity, even when the major life activity is an intrinsically physical one. See *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 829, 834 (1998) (firefighter's 20/400 vision substantially limited him in major life activity because the impairment completely prevented him from driving, reading, distinguishing people's faces, etc.); *Wilson v. Pennsylvania State Police Department*, 964 F. Supp. 898, 907-909 (E.D. Pa 1997) (genuine issue of material fact exists as to whether a state trooper applicant was substantially limited in the major life activity of seeing due to effects on driving, cooking, reading, and caring for infant son); *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1430 (N.D. Iowa 1996) (firefighter applicant who cannot drive, read, watch television or

In order to determine whether Kirkingburg's physical impairment substantially limits the major life activity of seeing, it is necessary to examine how his seeing significantly restricts him. Albertsons set forth a functional analysis of whether Kirkingburg is substantially limited in the major life activity of seeing in its Brief on the Merits, and relies on that analysis (Pet. Br., 21-25). Kirkingburg failed to provide persuasive evidence that his seeing is significantly restricted by his vision impairment; thus, he is unable to establish that he is disabled within the definition of the ADA.⁸

movies, walk in unfamiliar settings or read street signs was held to be substantially limited in the major life activity of seeing).

⁸ The EEOC asserts that the summary judgment record regarding whether Kirkingburg was disabled was not well developed because the Company did not move for summary judgment on that ground (EEOC Br., 8, 10, 11). However, Kirkingburg has not suggested he needs an opportunity to present additional evidence on the issue of disability. Also, the Ninth Circuit did not remand the issue whether Kirkingburg was disabled for further fact finding, but instead ruled on this issue.

It is appropriate for this Court to address the issue of disability. In *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379-380 (1995), this Court reached the merits of a claim that was raised for the first time in the Petitioner's Brief on the Merits. This Court stated "[o]ur traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* at 379 (internal citations omitted). This Court continued by stating that "... even if this were a claim not raised by the petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice permits review of an issue not pressed so long as it has been passed upon." *Id.* (internal citations omitted).

The case cited by Kirkingburg to support this argument is not applicable to the situation at hand. In *Blessing v. Freestone*, 529 U.S. 329, 340, 117 S.Ct. 1353, 1359 n. 3 (1997), only those questions "... which were neither raised nor decided below..." were not reviewed

B. Albertsons did not regard Kirkingburg as disabled.

Both Kirkingburg and the EEOC assert that the issue whether Kirkingburg was "regarded as" disabled should not be decided by this Court because the question was not raised in Albertsons' Petition for Writ of Certiorari. It is true that Albertsons did not include the specific question whether Kirkingburg was "regarded as" disabled in its questions presented. However, this specific question was raised and decided by the Ninth Circuit Court of Appeals. In *Lebron*, this Court noted that it will reach questions "... fairly embraced within the questions set forth in the petition for certiorari. . . ." *Lebron* at 379-380.

The ADA provides three alternative criteria for determining whether an individual is disabled. Two are at issue here: whether Kirkingburg has a physical impairment that substantially limits one or more of his major life activities and whether he is "regarded as" having such an impairment.⁹ A finding that Kirkingburg is disabled under

by this Court. In the instant case, the Ninth Circuit Court of Appeals did raise and decide this issue. Thus, even though Albertsons did not ask the District Court for summary judgment on the issue of disability, this Court may address it because the Ninth Circuit passed judgment on the issue.

⁹ Kirkingburg and the EEOC argue that this Court should not reach the "regarded as" issue because Albertsons asked in its Petition for Certiorari whether Kirkingburg is disabled *per se* (Resp. Br., 29; EEOC Br., 7). This is exactly what the supervisor's "legally blind or blind in one eye" comment indicates: all the supervisor did was name or describe the condition Kirkingburg has (J.A., 341). He is a monocular individual, i.e., blind in one eye.

The suggestion (Resp. Br., 29-30; EEOC Br., 20) that the supervisor's comment could fairly mean that he thought Kirkingburg, who had driven a truck for Albertsons in the past, was totally blind is not

either of the two theories would lead to the analysis of whether he is qualified in order to determine whether he is entitled to ADA protection. In other words, whether Kirkingburg is "regarded as" disabled could be determinative of whether he is entitled to the protection of the ADA. Thus, the "regarded as" issue is "fairly embraced" within the question whether Kirkingburg (as a monocular driver) is *per se* disabled under the ADA. Albertsons relies on the discussion in its Brief on the Merits on the issue whether the Company regarded Kirkingburg as disabled (Pet. Br., 25-28).

There is sufficient evidence for the Court to find that Albertsons did not regard Kirkingburg as disabled. However, if this Court disagrees and determines Kirkingburg was "regarded as" being disabled, such a finding will not necessarily require a remand to the lower court as suggested by Kirkingburg (Resp. Br., p. 12). If this Court finds that Kirkingburg is not qualified under the ADA for the truck driving position, the "regarded as" issue will become moot because Kirkingburg's cause of action will be dismissed.

II. Kirkingburg Is Not Qualified for the Position

A. Albertsons' qualification standard is job-related and consistent with business necessity.

Albertsons requires all of its interstate truck drivers to meet minimum DOT vision safety regulations. Pursuant to those requirements, which have not changed since 1970, drivers' minimum visual acuity standards are 20/40 in each eye. 49 C.F.R. § 391.41(b)(10). In the instant case, there is

reasonably embraced by either the comment or the situation.

no factual dispute that Kirkingburg's visual acuity is 20/200 uncorrectable vision in his left eye.

B. Objective evidence supports a finding that Kirkingburg poses a direct safety threat.

The ADA expressly states that employers, when setting qualification standards, may impose a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in work place. 42 U.S.C. § 12113(b).

Kirkingburg asserts that individualized assessment is required if a blanket qualification standard disqualifies individuals due to a disability based on "safety fears" (Resp. Br., p. 39). Kirkingburg further asserts that Albertsons justifies its rejection of Kirkingburg's experimental waiver on "generalized fears" about safety (Resp. Br., 14).

Assuming, *arguendo*, that Albertsons had an obligation to conduct an individual assessment, evidence that may be relevant to direct threat determination includes opinions of those who have expertise in the disability involved and/or direct knowledge of the individual with the disability. See 29 C.F.R. Pt. 1630 App. § 1630.2(r) (Interpretive Guidance).¹⁰ In assessing the objective evidence available regarding a dentist's actions in denying treatment to an individual with HIV, this Court stated that the views of public health authorities carry "special weight and authority."

¹⁰ The EEOC has expressed support for looking to objective experts in specific fields. See, for example, 29 C.F.R. Pt. 1630 App. § 1630.2(r) (Interpretive Guidance): "Relevant evidence may include . . . opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability."

Bragdon, 118 S.Ct. at 2211.

Here, the DOT, a public safety authority, has expertise in maintaining safety on the road by setting certain minimum physical standards, including vision standards. Implicit in the DOT's established minimum physical requirements is that the drivers who do not meet the minimum requirements of the statute are not safe. Relying on an extensive and comprehensive federal regulatory scheme intended to preserve highway safety cannot reasonably be characterized as having "generalized fears."

In this case, the EEOC acknowledges in its *Amicus Curiae* Brief that the direct threat defense "may be made out when a firm takes action required by a federal safety standard" (EEOC Br., 8). However, the EEOC asserts that Albertsons would still have been in compliance with all applicable regulations by permitting Kirkingburg to apply for a vision waiver (*Id.*). Kirkingburg agrees (Resp. Br., 14-15).

The issue here, however, is a decision by Albertsons to follow the long-held and established regular vision standards and not to accept the waiver. Albertsons is justified in relying on the DOT minimum vision standards. Albertsons is equally justified in not adopting the waiver.¹¹ The waiver is part of an experimental program that was set up in an attempt to determine whether the minimum vision standards should be changed in the future. They were not.

¹¹ The Ninth Circuit stated that the record is silent as to whether Albertsons knew at the time it rejected Kirkingburg's waiver that the experimental waiver program was invalid (*J.A.* 243). However, a citizen is presumed to know the law (*Atkins v. Parker*, 472 U.S. 115, 130 (1985)); and therefore, does not need to establish that in the record. At the time that Albertsons rejected Kirkingburg's waiver, the protocol for the waiver program was clearly experimental in nature and had not been appropriately validated then or since.

The issue is not whether Albertsons could have been in compliance if it took a waiver it chose not to take, but rather whether the Company can make out the case that its decision is supported by the direct threat defense. It can.

The experimental waiver program never resulted in changes to the minimum vision standards expressed in 49 C.F.R. § 391.41(b)(10) and has never been adopted as law.¹² The waiver program was and is an experimental program implemented to gather empirical data on the safety of drivers who did not meet the minimum DOT vision standards, to determine whether the minimum vision standards could be lowered without compromising highway safety.¹³

C. The experimental vision waiver program and its study was fatally flawed.

Objective evidence demonstrates that the experimental vision waiver program was not consistent with the public safety goals of the DOT regulations; in fact, the study of the FHWA's experimental vision waiver program was fatally flawed and cannot be construed as demonstrating that visually impaired drivers can safely operate commercial motor vehicles in interstate transportation.

In 1992, the FHWA announced its intention to issue waivers of the DOT vision standards to "conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the

¹² The DOT has not changed the Regulations, themselves, to include a lower vision requirement. 63 Fed. Reg. 41769, 41770 (1998) (to be codified at 49 C.F.R. Pt. 391) (proposed Aug. 5, 1998).

¹³ Kirkingburg characterizes the experimental waiver program identically. (Resp. Br., 39).

Federal vision requirements." Qualification of Drivers, 57 Fed. Reg. 23370, 23370 (1992).¹⁴ The FHWA stated it believed existing studies were not sufficient to identify safe levels for the vision requirements of drivers and expressed its intention to use the data generated by the waiver study to explore the feasibility of relaxing the vision standards in 49 C.F.R. § 391.41(b)(10). Qualification of Drivers, 57 Fed. Reg. 10295, 10295 (1992); Qualification of Drivers, 57 Fed. Reg. 31458, 31459 (1992).¹⁵

The protocol for the study was criticized by agencies that filed comments both for and against the program. The National Private Truck Council, while expressing strong support for the waiver program, was gravely concerned about the study group proposed by the FHWA and the lack of a compatible control group. *Id.* at 31459. The Insurance Institute for Highway Safety ("IIHS") opposed the program because evidence that visually impaired commercial drivers have an increased risk of crash involvement indicated it would place the public at unacceptable risk. They reported a study that found heavy vehicle operators with less than 20/40 visual acuity in one eye had 65% more crashes while operating commercial vehicles than operators with at least 20/40 acuity in each eye.¹⁶ *Id.* at 31459, FHWA Docket No.

¹⁴ The FHWA rejected the strong recommendations of its own consultants to *strengthen* the standard. Lawrence E. Decina, et al., *Visual Disorders and Commercial Drivers* at 37-40 (1991).

¹⁵ Apparently, the study did not attempt to differentiate between the level of visual impairment of the drivers in the study group, in spite of the fact that the FHWA's objective was to determine the level of vision impairment that could be accommodated without increasing safety risk.

¹⁶ This was after adjustment for age using ANCOVA (analysis of covariance). Patrice N. Rogers, et al., *Accident and Conviction Rates*

MC-92-27. IIHS also provided an extensive list of methodological flaws in the protocol. In spite of the seriousness of the criticisms, the FHWA went forward with the program and contracted with Conwal, Incorporated to administer the program. *Qualifications of Drivers*, 59 Fed. Reg. 50887, 50890 (1994).

On August 2, 1994, the D.C. Circuit invalidated the vision waiver program because it did not meet the requirements of 49 U.S.C. § 2505(f) (the Motor Carrier Safety Act of 1984 only allows a waiver of regulations establishing minimum federal safety standards if "such waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles"). *Advocates for Highway Safety v. Federal Highway Administration*, 29 F.3d 1288, 1290 (CA DC 1994).¹⁷ Shortly thereafter, the FHWA announced a temporary revalidation of the current waivers to allow drivers previously issued waivers to continue participating in the program until its conclusion. *Id.* at 50887. It claimed the data from the first two years of the study provided empirical evidence that drivers who did not meet the DOT vision standards could drive safely. *Id.* at 50890.

The study and its results were disturbingly flawed. When the researchers encountered difficulties recruiting volunteers for the control group, they chose not to use one.¹⁸ For the study's findings to be valid, they had to use a control group, comparable to the visually impaired drivers with

of Visually Impaired Heavy-Vehicle Operators at 23-24 (1987).

¹⁷ See also *Advocates* at 1294.

¹⁸ John R. Sheridan & Ann F. DuLaney, *Qualifications of Drivers - Vision, Diabetes, Hearing and Epilepsy* at 6 (1997).

respect to the variety of driver characteristics and operational environments known to affect crash risks, to eliminate the effects of such confounding variables.¹⁹

Instead, the entire analysis of the safety of visually impaired drivers was limited to comparing their accidents to *estimates* of accidents for the entire population of heavy truck operators in the United States.²⁰ To compound the validity problems this created, the data for the two groups were from different time periods. In the research report on which the revalidation of waivers was based, the waiver group's data was from the period July 1992 to February 1994 and the GES data was from calendar year 1992.²¹ It is unlikely the two sets of data were comparable, because estimates of total truck accidents vary significantly from year to year in the NHTSA's National Accident Sampling System (from which the GES is derived). Blower, et al., *supra* note 19 at 307.

One of the strongest challenges to the reliability of the data is that the study relied on self-reports of visually

¹⁹ Among the factors related to crash risk are: age and annual mileage (Decina, et al., *supra* note 12 at 11), type of road, tractor configuration, the time of day driving occurs, and geographic location of road (rural or urban) (Daniel Blower, et al., *Accident Rates for Heavy Truck-Tractors in Michigan*, 25 *Accid. Anal. & Prev.* No. 3 at 307 (1993)).

²⁰ Data for the national group was taken from the General Estimates System ("GES") (National Highway Traffic Safety Administration, *Traffic Safety Facts 1992* at 17, 26). The researchers looked at total crash rates, and the severity and initial point of impact of crashes. Crash rates were calculated as number of accidents divided by million vehicle miles traveled ("VMT").

²¹ Sheridan et al., *supra* note 18, *The Third Interim Monitoring Report On The Drivers Of Commercial Motor Vehicles Who Receive Vision Waivers* at 1-2 (June 27, 1994).

impaired drivers for data on crashes and mileage driven. The researchers themselves noted that self-reports are problematic because of willful non-reporting by drivers and admitted that, in spite of an elaborate system of reminders and warnings, many drivers were not particularly reliable about their reporting obligations. Sheridan et al., *supra* note 18 at 70.

Although it was part of the original research design, the first attempt to monitor state motor vehicle records to check the accuracy of self-reports did not begin until July 1993, and states which had not responded by November 1993 were not sent follow-up requests for records until March 1994. Sheridan et al., *supra* note 18 at 61-62. The effect of non-reporting on reported results is demonstrated by the fact that the waiver group's accident rate was originally reported as 1.775 per million VMT as of August 1993 (compared to 2.531 for the national group),²² but was later revised to 2.12 as of June 1993 (the rate for the national group was reduced to 2.13).²³ The changes are even more striking when one considers that the latter report apparently excluded data, including accident involvement, for 381 drivers whose waivers had been revoked. Data is only presented for drivers still active in the waiver program at the time a report is prepared; when an individual's waiver is revoked for program noncompliance, vision degradation, self-termination or death, any accidents he or she was involved in are removed from the analysis. *Id.* at 2, 4.

²² Sheridan et al., *supra* note 18, *Monitoring Drivers of Commercial Motor Vehicles Who Receive Vision Waivers (Revised)* at 2 (March 22, 1994).

²³ Sheridan et al., *supra* note 18, *An Assessment of the Risk Associated With the Disposition of Vision and Diabetes Waiver Programs* at Table 2 (October 12, 1995).

III. **Albertsons Had No Obligation to Accommodate Kirkingburg**

Kirkingburg asserts "[t]he ADA imposes an affirmative obligation on the employer to reasonably accommodate individuals with disabilities. . . ." (Resp. Br., 45) (citing to 42 U.S.C. § 12112(b)(5)(A)). Kirkingburg leaves out a key term from the statute -- the individual must be "otherwise qualified" -- for the obligation of reasonable accommodation to apply. Kirkingburg is not "otherwise qualified," and the Company had no obligation to offer him a reasonable accommodation. Albertsons relies on its discussion of this issue in its Brief on the Merits (Pet. Br., 42-44).

A. **Albertsons did not need to offer Kirkingburg a futile reasonable accommodation.**

Kirkingburg asserts that the Company failed to reasonably accommodate him by refusing to provide him with a leave of absence in order to obtain a vision waiver, or "other form of job restructuring" (Resp. Br., 47). The goal of reasonable accommodation is to remove work place barriers and enable otherwise qualified individuals to enjoy equal employment opportunities as those who are not disabled. 29 C.F.R. Pt. 1630 App. § 1630.2(o) (Interpretive Guidance).

An employer has no obligation to provide an employee with leave when it is impossible for the employee to "become qualified" during the period of leave.²⁴

²⁴ H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 64-65 (1990) (House Education and Labor Committee), reprinted in 1990 U.S.C.C.A.N. 303.

Regardless how much time the Company might have given Kirkingburg to obtain a waiver, having the waiver would essentially have no effect because Kirkingburg would still not be qualified for the position of truck driver at Albertsons.

Albertsons also had no obligation to restructure Kirkingburg's job as a truck driver. The Regulations unambiguously state that an employer has no obligation to waive essential functions of a position in providing an accommodation or to create a new position. 29 C.F.R. Pt. 1630 App. § 1630.2(o) (Interpretive Guidance). In the EEOC's view, the underlying goal of accommodation is to enable an otherwise qualified individual to perform the essential functions of his or her job. EEOC Technical Assistance Manual § 3.2, page III-2.

In this case, in order for Kirkingburg to be qualified for the position of truck driver, his job would have to be restructured so he would not be required to drive in interstate commerce. That is an essential function of his job as a truck driver. Albertsons has no obligation to eliminate or restructure that essential function as a reasonable accommodation.

B. Albertsons was not required to reassign or temporarily transfer Kirkingburg to the Yard Hostler position.

Kirkingburg suggests that Albertsons should have temporarily transferred him to the Yard Hostler position in November 1992 rather than terminating his employment (Resp. Br., 46).²⁵ There are two problems with the

²⁵ Albertsons does not concede that it had a legal duty to reassign Kirkingburg (Pet. Br., 46-48). Despite the mandatory language in the recent EEOC Enforcement Guidance (at page 19), Albertsons

contention. First, the Yard Hostler position required the same DOT certificate for visual acuity as any other driving position with the Company (J.A. 396). Second, even if this Court found that Albertsons' qualification standard for vision should not apply to the position of Yard Hostler, Kirkingburg failed to establish that the position was vacant in November 1992 (J.A. 128).

The most recent EEOC Policy Guidance, issued March 1, 1999, specifically addressed reasonable accommodation under the ADA. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (www.eeoc.gov/docs/accommodation.html). Assuming, *arguendo*, that the Court finds Albertson had an affirmative duty to offer Kirkingburg a vacant position, Kirkingburg must have been qualified for that position and the position must be vacant (Id. at 19). "Vacant" means that "... the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time." Id. at 20.²⁶

continues to believe this exceeds the intent of the statute, which is permissive. 42 U.S.C. § 12111(a)(B).

²⁶ Two examples provided in the EEOC's Guidance are instructive:

Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

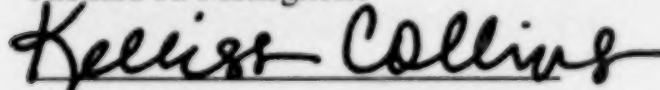
On Kirkingburg's Motion for Reconsideration of Summary Judgment on this exact issue, the trial judge denied the Motion because Kirkingburg failed to show that the yard hostler job was vacant when he was terminated (J.A. 128). Consequently, this issue should not be remanded, as Kirkingburg suggests, because it was previously decided by the trial court.

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Example D: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent positions plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

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In the Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC., PETITIONER

v.

HALLIE KIRKINGBURG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AND THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE
SUPPORTING RESPONDENT**

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QUESTIONS PRESENTED

1. Whether there are genuine issues of material fact as to whether respondent was disabled, within the meaning of 42 U.S.C. 12102(2)(A), when petitioner fired him from his job as a truck driver.
2. Whether there are genuine issues of material fact as to whether respondent, who had received a vision waiver from the Department of Transportation to drive a commercial truck in interstate commerce, was "qualified" to be a truck driver for petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-591

ALBERTSONS, INC., PETITIONER

v.

HALLIE KIRKINGBURG

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AND THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE
SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

This case concerns the definitions of "disability" and "qualified individual with a disability," two important statutory terms in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* Congress delegated to the Equal Employment Opportunity Commission (EEOC) and the Department of Justice authority to promulgate regulations and to enforce the provisions of the ADA. Both agencies have issued extensive regulations and interpretive guidance concerning the definition of these terms. In addition, this case concerns the extent to which vision waivers issued by the Department of Transportation pursuant to the Motor Carrier Safety Act of 1984, 49 U.S.C.

31131 *et seq.*, may affect an employer's obligation to comply with the ADA.

STATEMENT

1. The Motor Carrier Safety Act of 1984 (Safety Act) directs the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety," that "ensure that * * * the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely." 49 U.S.C. 31136(a)(3). The Act also provides that "[e]ach employer and employee shall comply with regulations on commercial motor vehicle safety prescribed by the Secretary of Transportation * * * that apply to the employer's or employee's conduct." 49 U.S.C. 31135. During the time period relevant to this litigation, the Act authorized the Secretary to "waive any part of a regulation * * * as it applies to a person or class of persons, if the Secretary decides that the waiver is consistent with the public interest and the safe operation of commercial motor vehicles." 49 U.S.C. 31136(e).¹ If the Secretary waives a regulation (such as the vision standards at issue here), it no longer "appl[ies]" to employers and employees under Section 31135, and they need not comply with it.

The Secretary has delegated regulatory authority under the Safety Act to the Federal Highway Administration (FHWA). 49 C.F.R. 1.48(aa), 1.48(f). Under FHWA regulations, persons who operate commercial vehicles that weigh more than 10,000 lbs. and transport persons or property in interstate commerce must undergo a physical examination

¹ Congress amended the waiver provisions, effective June 9, 1998, in the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107. The new statute provides that the Secretary may issue an "exemption" for a renewable 2-year period, if he finds that "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." See § 4007, 112 Stat. 401 (codified at 49 U.S.C. 31315).

every two years to determine whether they can be certified as satisfying the requisite physical qualifications. See 49 C.F.R. 390.3(a), 390.5, 391.43, 391.45., 391.45(b)(1).

Under the federal vision standards that have been in effect since 1971, an individual is qualified to drive a commercial vehicle in interstate commerce if that person, *inter alia*, "[h]as distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses." 49 C.F.R. 391.41(b)(10); 35 Fed. Reg. 6458 (1970). That standard excludes individuals who have poor vision in one eye that cannot be corrected.

2. Respondent Hallie Kirkingburg has been driving commercial trucks since 1979. J.A. 228, 286-287. The vision in respondent's right eye is 20/20 and his vision in both eyes is at least 20/25. J.A. 34-35, 99-101. The vision in respondent's left eye, however, has been 20/200 since birth. J.A. 34-35. The poor vision is caused by amblyopia, a condition commonly referred to as "lazy eye," and it is not correctable by corrective lenses. J.A. 35. Respondent's treating optometrist, Dr. Beatrice Michel, O.D., testified that respondent's vision is essentially monocular. J.A. 306 (respondent "has always functioned as a one-eyed person"). She also testified, however, that respondent has learned to rely on "monocular cues" to compensate for restrictions on his ability to perceive depth. J.A. 300-303. Dr. Michel testified that in her medical opinion respondent can drive a commercial vehicle as well as a person with standard vision in both eyes. J.A. 36, 305-306.

In August 1990, petitioner Albertson's, Inc. hired respondent as a driver at its distribution center in Portland, Oregon. J.A. 228, 275, 367. Prior to starting work for petitioner, respondent was examined by a physician who certified that respondent's vision met the requirements established by the Department of Transportation (DOT). J.A. 99-101. Respondent also satisfactorily completed an

eighteen-mile road test administered by Albertson's. C.A. Rec. 133-134, 144.

In December 1991, respondent injured his head when he fell from a company truck. J.A. 367. He was unable to work for almost a year. J.A. 283. Petitioner required respondent to have a new physical examination by one of its contract physicians before returning to work. J.A. 283. A physician examined respondent on November 5, 1992. J.A. 357. The physician informed respondent that his vision did not meet federal standards and that he would have to obtain a vision waiver from DOT. J.A. 284. Respondent promptly applied for a waiver on Nov. 12, 1992. J.A. 369.

Petitioner dismissed respondent by telephone on November 20, 1992, and told him that petitioner would not accept a vision waiver. J.A. 364. Franklin Delano Riddle, the general manager at petitioner's Portland Distribution Center, J.A. 312, made the decision to fire respondent, J.A. 314. Riddle told another employee that they would have to fire respondent because "he was legally blind, or blind in one eye." J.A. 341.

At the time of respondent's termination, petitioner's employment manual required drivers to "comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." J.A. 333. The company had no written vision standards or policy regarding waivers. J.A. 332-334, 340. Petitioner's sole basis for deciding not to accept the waivers was its concern about safety. J.A. 315, 323.

DOT issued respondent a vision waiver on February 25, 1993, authorizing him to "operate a CMV [commercial motor vehicle] in interstate commerce." J.A. 379, 381. Respondent informed petitioner that he had obtained a vision waiver, but petitioner refused to reinstate him as a driver. J.A. 276, 385-386, 393. After respondent filed a union grievance, petitioner offered respondent a position as a yard hostler, a position that involved moving trailers on company property.

J.A. 388. Petitioner later withdrew the offer, however, claiming that DOT certification was required for the position.² J.A. 395-396.

3. Respondent filed suit in the United States District Court for the District of Oregon alleging that petitioner's conduct violated the ADA. J.A. 4. Petitioner moved for summary judgment on the sole ground that respondent was not "qualified" for a driving position with petitioner; petitioner did not argue that respondent was not disabled, J.A. 39-48, but instead stated in its moving papers that "[s]hould this case go to trial, [respondent] will of course bear the burden of proving *all* elements of his ADA claim, including the existence of a covered 'disability.'" J.A. 60 n.1. The district court granted petitioner's motion on October 25, 1995. J.A. 122. The court held that petitioner "properly considered meeting DOT minimum requirements" to be an essential function of the job, and that "the ADA does not obligate [petitioner] to employ truck drivers who have received vision waivers." J.A. 119-120.

4. On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed. Petitioner argued, apparently as an alternative ground for affirmance, that respondent was not disabled because he was not substantially limited in the major life activity of seeing. The court did not refer to the fact that petitioner had never moved for summary judgment on that ground, but instead rejected petitioner's argument on its merits. Noting that EEOC regulations define an impairment to be substantially limiting if it "significantly restricts as to the condition, man-

² DOT certification would not have been required for such a position if it did not involve driving on the road. Petitioner later offered respondent a position as a tire mechanic. Respondent turned down the position, in part because the pay was substantially below what he had received as a driver. J.A. 281-282.

ner or duration under which an individual can perform a particular major life activity," the court held:

Kirkingburg's inability to see out of one eye affects his peripheral vision and his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see. To put it in its simplest terms, Kirkingburg sees using only one eye; most people see using two.

J.A. 234-235. As an "alternative ground for [its] decision," the court held that evidence that one of [petitioner's] managers described him as "blind in one eye, or legally blind" was sufficient to raise a genuine issue as to whether [petitioner] regarded respondent as disabled. J.A. 236-237.

The court further held that respondent had raised a genuine issue of material fact as to whether he was "qualified" to drive a truck. The court held that respondent's record of driving commercial trucks safely was sufficient to establish that he could perform the essential functions of the job. J.A. 237-238. The court rejected petitioner's argument that federal law precluded it from allowing respondent to drive. The court noted that the Safety Act authorized DOT to waive its regulatory requirements and that respondent had obtained a waiver. J.A. 239-240.

The court further held that petitioner had presented no evidence that respondent or other commercial drivers who met the vision waiver requirements were a direct safety threat. J.A. 246. The court added that petitioner was not in any event free to adopt stricter safety standards than those required by federal law. The court held that in light of the FHWA's determination that waiver recipients do not pose a threat to public safety, petitioner was precluded from asserting that they do. The court left open the possibility that

petitioner might be able to adhere to stricter standards if it established that the work its drivers performed was substantially different from the work performed by other commercial truck drivers. J.A. 247-248.

Judge Rymer dissented on the ground that respondent had not established that he was "qualified". She asserted that petitioner was not required to honor respondent's waiver because in 1992 the agency had not had a basis for determining that the waivers would be consistent with public safety. J.A. 249-254.

SUMMARY OF ARGUMENT

The court of appeals correctly decided that petitioner was not entitled to summary judgment on the ground that respondent was not disabled. Initially, the court of appeals' holding can be affirmed on the basis that petitioner did not move for—and was not granted—judgment on the ground that respondent was not disabled. In any event, monocular vision is frequently a disability under the ADA, because it substantially limits both the amount (the visual field) and the quality (the ability to see in three dimensions) of an individual's major life activity of seeing. The fact that it may not also limit other "normal daily activities" of the individual, see Pet. Br. 22, is of no significance, because the ADA is largely premised on the principle that individuals who are limited in one or more major life activities (here, seeing) can overcome those limitations to perform many activities (including working) competently and effectively.

Petitioner argues that the court of appeals erred in holding that it was not entitled to summary judgment on the ground that respondent was not "regarded as" disabled. The petition for certiorari did not present any question concerning the court of appeals' "regarded as" holding, and accordingly petitioner's "regarded as" argument is not properly before the Court. In any event, the court of appeals correctly held that petitioner's statement that respondent

was, *inter alia*, "legally blind" was sufficient to create a material issue of fact concerning whether petitioner regarded respondent as disabled. In addition, evidence of petitioner's apparent belief that respondent could not safely perform any job that required DOT certification is sufficient to create a material issue of fact as to whether petitioner regarded respondent as substantially limited in the major life activity of working.

The court of appeals was also correct in holding that petitioner was not entitled to summary judgment on the ground that respondent was not qualified for his job. A qualification standard, such as petitioner's binocular vision standard, must be justified under the ADA in terms of job-relatedness and consistency with business necessity. In the case of qualification standards that are based on a safety rationale, that requires an inquiry into whether respondent would pose a "direct threat" to the health or safety of himself or others. Although that defense may be made out when an employer takes an action required by a federal safety standard, petitioner cannot rely on that justification here, since petitioner could have complied with all applicable regulations by permitting respondent to apply for a vision waiver, which respondent ultimately did obtain. Because there was substantial evidence that respondent could safely drive a truck, and because the only evidence pointed to by petitioner to the contrary was the (waivable) federal binocular vision standard that petitioner adopted without the waiver component, there remain substantial issues of material fact that would preclude granting summary judgment to petitioner on this ground.

ARGUMENT

I. PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT RESPONDENT IS NOT A PERSON WITH A DISABILITY

A. Respondent's Claim Of Actual Disability Was Not Challenged By Petitioner's Summary Judgment Motion, And Respondent Therefore Did Not Offer The Ample Available Evidence To Support It

Petitioner's summary judgment motion did not challenge respondent's claim of "disability," but instead challenged only his claim that, despite his disability, he was "qualified" for the job. J.A. 39-40. Therefore, respondent did not develop the summary judgment record regarding the nature and extent of his impairment to show that his monocular vision constituted a disability.

When petitioner challenged the existence of a disability for the first time on appeal, see J.A. 182-185, the court of appeals declined to hold that petitioner was entitled to summary judgment on the issue. J.A. 234-237. That holding was correct, because it cannot be said that respondent could not meet a properly supported summary judgment motion on this point. To the contrary, as set forth below, monocular vision will frequently constitute a disability within the meaning of the statute—"a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," 42 U.S.C. 12102(2)(A)—namely, the major life activity of seeing.

1. Petitioner acknowledges that it "filed for summary judgment on the ground that [respondent] was not a qualified individual, with or without accommodation, under the ADA because he could not meet the DOT vision standards." Pet. 11; see J.A. 39-40. Petitioner did not move for summary judgment on the ground that respondent was not disabled, and the district court did not address that issue in the course

of its decision to grant summary judgment to petitioner on the ground that petitioner was not "qualified." J.A. 115-121.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), this Court noted that under Federal Rule of Civil Procedure 56, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion." *Id.* at 323. The moving party's discharge of that responsibility in turn "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. See also *id.* at 328 (White, J., concurring). If the party has not been placed on notice that summary judgment may be entered against it on a particular ground, any absence of sufficient evidence to create a material issue of fact essential to that ground does not betoken the lack of a genuine dispute between the parties.³

³ As the Court noted in *Celotex*, a district court has authority to enter summary judgment *sua sponte*—but only if "the losing party was on notice that she had to come forward with all of her evidence." 477 U.S. at 326. The lower courts have uniformly held that summary judgment may not be entered against a party that had no notice or that was not given the full ten-day period provided by Rule 56(c) to produce its evidence for the summary judgment record. See, e.g., *National Fire Ins. v. Bartolazo*, 27 F.3d 518, 519 (11th Cir. 1994); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 909-910 (3d Cir. 1994); *Stella v. Town of Tewksbury*, 4 F.3d 53 (1st Cir. 1993); *Peckmann v. Thompson*, 966 F.2d 295, 297 (7th Cir. 1992); *Judwin Properties, Inc. v. United States Fire Ins. Co.*, 973 F.2d 432, 436-437 (5th Cir. 1992); *Winbourne v. Eastern Air Lines, Inc.*, 632 F.2d 219 (2d Cir. 1980).

Petitioner's argument illustrates the difficulty of viewing the summary judgment record in this case as if it were complete. Petitioner relies heavily on respondent's reply, "Not that I recall," to the question whether his impairment has ever interfered with his work. See Br. 23. That answer may be of relevance had respondent claimed to be limited in *working*, but it does not suggest that respondent is not substantially limited in the major life activity of *seeing*.

Because petitioner failed to move for summary judgment on the question whether respondent was a person with a disability, summary judgment may not be entered against respondent on that ground. The only possible exception to that rule would be if it could be shown that the party against whom summary judgment is sought could not possibly have introduced evidence in support of its claim, *i.e.*, if the pleadings are essentially sufficient to warrant judgment against that party. As we show below, however, there is ample support for the proposition that monocular vision is ordinarily a disability under the ADA, because it substantially limits the major life activity of seeing.⁴ The Ninth Circuit therefore correctly declined to grant summary judgment to petitioner on the ground that monocular vision is not a disability.

2. The ADA defines a "disability" in terms of three separate, alternative criteria. Under the first criterion—actual disability—a disability is "a physical or mental impairment that substantially limits one or more * * * major life activities." 42 U.S.C. 12102(2)(A). There is no dispute that monocular vision is a "physical * * * impairment." See 29 C.F.R. 1630.2(h)(1); *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998). Monocular vision frequently substantially limits the major life activity of seeing.⁵ See *id.* at 2205 ("seeing" is major life activity); 29 C.F.R. 1630.2(i) (same).

EEOC regulations state that an impairment is substantially limiting if it "[s]ignificantly restrict[s] * * * the condition, manner or duration under which an individual can perform a particular major life activity as compared to the

⁴ See *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), cert. denied, 118 S. Ct. 693 (1998); *EEOC v. Union Pac. R.R.*, 6 F. Supp. 2d 1135 (D. Idaho 1998); *Coleman v. Southern Pac. Transp. Co.*, 997 F. Supp. 1197 (W.D. Ariz. 1998); *Magiera v. Ford Motor Co.*, No. 97C0421, 1998 WL 704061 (N.D. Ill. Sept. 30, 1998).

⁵ Any issues regarding whether there are differences among monocular individuals based on the extent of vision loss in the affected eye and precise measures of respondent's vision would remain open on remand.

condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. 1630.2(j).⁶ The regulations thus correctly recognize that an impairment may substantially restrict the process by which a person performs a major life activity, even if they do not make performance of that activity impossible. See *Bragdon*, 118 S. Ct. at 2206 ("The Act addresses substantial limitations on major life activities, not utter inabilities.").

3. Studies of monocular vision indicate that it often substantially limits vision.⁷ Most studies agree that the most significant limitations of monocular vision are reduced field of vision and lack of binocular depth perception. See, e.g., A. J. McKnight et al., *The Visual and Driving Performance of Monocular and Binocular Heavy-Duty Truck Drivers*, 23 *Accid. Anal. & Prev.* 225 (1991). With respect to visual field, one study found that, on average, persons with monocular vision had a visual field of 145 degrees as compared to 173 degrees for persons with binocular vision. *Id.* at 231. That study concluded that this difference was "obviously highly significant both statistically and practically." *Ibid.*

Persons with monocular vision also lack binocular depth perception. Binocular vision enables persons to achieve

⁶ "As the agency directed by Congress to issue implementing regulations [see 42 U.S.C. 12116], to render technical assistance explaining the responsibilities of covered individuals and institutions [see 42 U.S.C. 12206(c)(1)-(2)(A)], and to enforce Title [I] in court [see 42 U.S.C. 12117(a)], the [EEOC]'s views are entitled to deference." *Bragdon*, 118 S. Ct. at 2209 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). The EEOC's commentary interpreting its own regulations and its Technical Assistance Manual are also "entitled to deference." See *Stinson v. United States*, 508 U.S. 36, 45 (1993).

⁷ The court of appeals noted not only that respondent sees in a different "manner," but also that his vision is "limited" in both depth perception and peripheral vision. J.A. 234-235.

"stereopsis," i.e. to see objects in three dimensions. See Hugh Davson, *The Physiology of the Eye* 351 (2d Ed. 1963); Samuel L. Fox, *Industrial and Occupational Ophthalmology* 23 (1973). Because the two eyes are separated laterally, their two images are not identical; one eye receives a right-view of the object and the other a left-slanted view. When the two images are merged in the visual cortex, a three-dimensional image results. *Ibid.*

Persons with monocular vision are not able to achieve stereopsis and therefore do not see objects in a three-dimensional pattern. Davson, *supra*, at 351. Stereopsis is not, however, the only method of perceiving depth. There are a variety of "monocular cues" (i.e., visual observations that do not require binocular vision) that can contribute to depth perception. See, e.g., Esther G. Gonzalez et al., *Depth Perception in Children Enucleated at an Early Age*, 4 *Clin. Vision Sci.* 173 (1988); see also James E. Sheedy, et al., *Binocular vs. Monocular Task Performance*, 63 *Am. J. of Optometry & Physiological Optics* 839 (1986); J.A. 301. There is also evidence that many people adjust to loss of vision in one eye in approximately one year or less. Gonzalez, *supra*, at 173. Researchers have concluded that stereopsis is most important at perceiving depths less than six meters away, cf. J.A. 300, but that it can contribute to depth perception for distances up to 185 meters. McKnight, *supra*, at 227.

4. Taken together, the limitations monocular vision imposes on a person's ability to see, in terms of field of vision and lack of three-dimensionality, are "substantial" within the meaning of the ADA and "significant" within the meaning of the EEOC's implementing regulations. Both the amount that a monocular person sees and the quality of what such a person sees may be substantially less than that of an individual with binocular vision. The amount is less because, as noted above, when a person with one functioning eye looks out at the world, that person sees a substantially

narrower field than when an individual with binocular vision looks at the same place. And the quality is less because, as explained above, a monocular individual will be unable to perceive an essential quality of objects—their three-dimensional nature—through his eyes. In our view, monocularity will therefore frequently be a disability under the ADA.

5. Petitioner argues that a person is disabled within the meaning of the ADA only if the person cannot “otherwise perform normal daily activities requiring eyesight,” and that respondent’s monocular vision does not satisfy that test. Pet. Br. 22 (citing *Still v. Freeport McMoran, Inc.*, 120 F.3d 50, 53 (5th Cir. 1997)). The test proposed by petitioner, however, is not the test required by the ADA or its implementing regulations. The pertinent inquiry under the ADA is whether one or more major life activities is substantially limited, see *Bragdon*, 118 S. Ct. at 2202, not whether the person is able to overcome those limitations when performing *other* activities. Taken to its logical conclusion, petitioner’s test would justify the conclusion that a particularly vigorous person who uses a wheelchair is not disabled because he or she can drive a car, complete a marathon, live independently, and perform other activities as effectively as a person without mobility impairments. Title I of the ADA was premised in part on the principle that individuals with disabilities can overcome them to perform many activities competently and effectively, if employers will only give them the chance to do so.⁸ The fact that an individual can function well in a wide range of activities, therefore, cannot be the

⁸ See, e.g., H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 46 (1990) (House Labor Rep.) (“How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials?”) (quoting testimony before House Subcommittee on Select Education, Ser. No. 101-56, August 28, 1989, at 67.)

basis for excluding that individual from the class protected by the statute.

B. The Court Of Appeals’ Ruling On Respondent’s Alternative Claim That He Was “Regarded As” Disabled Was Not Challenged By The Petition For Certiorari And Is Not Properly Before This Court

1. The petition for a writ of certiorari sought review on one and only one question concerning whether respondent is a person with a disability: “[w]hether a monocular individual is ‘disabled’ per se, under the Americans with Disabilities Act (“ADA”) 42 U.S.C. § 12112(a) (1994).” Pet. i. It is quite clear, for two reasons, that that question brought the Ninth Circuit’s “actual disability” analysis under 42 U.S.C. 12102(2)(A)—not its “regarded as” holding under 42 U.S.C. 12102(2)(C)—before this Court.

First, the body of the petition argued only that the Ninth Circuit had held that a monocular driver has a “per se” actual disability, see Pet. 15-16, and that such a holding conflicted with the decision of the Fifth Circuit in *Still v. Freeport McMoran, Inc.*, 120 F.3d 50 (1997), see Pet. 16. The petition presented no argument or discussion whatsoever concerning the Ninth Circuit’s “regarded as” holding.

Second, the Ninth Circuit’s “regarded as” holding plainly was not a “per se” holding, and therefore could not have come within the question presented. The Ninth Circuit’s entire discussion consisted of its reference to the “regarded as” provision of the ADA and the statement that “[b]ecause [respondent] has presented evidence showing that one of [petitioner’s] managers described him as ‘blind in one eye or legally blind,’ he has established a genuine issue as to whether his employer believed he was disabled.” J.A. 237. The Ninth Circuit’s ruling was thus based on an inference that could be drawn from a particular statement of petitioner’s manager, and it could not be reasonably understood

to be a holding that people with monocular vision are "per se" regarded as disabled.

2. Petitioner's brief on the merits (Br. i) adds a new question to those presented in the petition: "Whether a remark that a monocular driver is blind in one eye supports a claim that an employer regards that individual as disabled under the ADA." Under Rule 14.1(a) of the Rules of this Court, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."⁹ See also Sup. Ct. R. 24.1(a). Because the petition for certiorari in this case did not present any question concerning the court of appeals' "regarded as" ruling, and because no such question is fairly included in the questions presented, this Court should not reach respondent's challenge to the court of appeals' "regarded as" ruling.¹⁰ We nonetheless briefly address the merits of petitioner's argument.

⁹ Amicus United Parcel Service argues (Br. 20) that the court of appeals' "regarded as" holding "is dependent on the court's initial conclusion that monocular vision constitutes a disability *per se*." Even if it were so dependent, that would not alter the fact that no question concerning the court of appeals' "regarded as" holding is properly before this Court. In any event, the court of appeals' "regarded as" holding was not "dependent" on any earlier part of its analysis. Instead, it rested on the evidence that respondent's supervisor said, *inter alia*, that respondent was "legally blind." If viewed in the light most favorable to respondent, that evidence would certainly be sufficient to raise an inference that the supervisor regarded him as disabled, *i.e.*, substantially limited in the major life activity of seeing, regardless of whether monocular vision constitutes an actual disability, either *per se* or on the facts of this case. Thus, the court of appeals' "regarded as" holding is truly, as the court of appeals stated, an "alternative ground," J.A. 236, and it stands entirely independent of the court of appeals' "actual disability" discussion.

¹⁰ The Ninth Circuit's holding concerning respondent's "regarded as" disability was sufficient to support its judgment that petitioner could not be granted summary judgment on the ground that respondent is not disabled. That would ordinarily provide a powerful reason for this Court not to reach even the question whether respondent had an "actual" disability. By not including any such argument in his brief in opposition,

3. An individual is "disabled" under the ADA not only if the individual has an impairment "that substantially limits one or more of the major life activities of such individual," 42 U.S.C. 12102(2)(A), but also if the individual is "regarded as having such an impairment," 42 U.S.C. 12102(2)(C). The "regarded as" provision reflects Congress' concern with protecting persons with disabilities from the "effects of erroneous but nevertheless prevalent perceptions" about disabling conditions. See *School Bd. v. Arline*, 480 U.S. 273, 279 (1987). The record in this case contains sufficient evidence that respondent regarded petitioner as having an impairment (his impaired vision) that substantially limited petitioner in the major life activities of seeing and working.

a. Because there is no dispute that petitioner was aware of respondent's vision impairment, the sole remaining question is whether petitioner viewed that impairment as substantially limiting one of his major life activities. Franklin Delano Riddle, the manager who made the decision to fire respondent, stated that respondent was "legally blind, or blind in one eye." J.A. 341. Taken in the light most favorable to respondent, this statement indicates that Riddle believed that respondent was "legally blind." The fact that an employer regards an employee as "legally blind" is ample to support an inference that the employer regards the employee as substantially limited in the major life activity of seeing. See *Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985) (legal blindness is a handicap under the Rehabilitation Act).

Petitioner argues (Br. 28) that there is no causal connection between Riddle's statement and the decision to terminate respondent. Whether petitioner fired respondent because it regarded him as "legally blind," however, con-

however, respondent appears to have waived any argument that the Court should not reach the "actual disability" issue. See Sup. Ct. R. 15.2. This Court of course retains the discretion to decline to reach the "actual disability" issue.

cerns whether discrimination has occurred under 42 U.S.C. 12112, not whether he was "regarded as" disabled under 42 U.S.C. 12102(2)(C). In any event, such questions of causality must be resolved at trial. The court of appeals correctly held that Riddle's statement is sufficient to raise a genuine issue of material fact on the "regarded as" issue.¹¹

b. Alternatively, there is sufficient evidence that petitioner regarded respondent as substantially limited in the major life activity of working. EEOC regulations provide that a person is substantially limited in the ability to work if the person is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i). The regulations add that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Ibid.*¹²

Viewed in the light most favorable to respondent, the record demonstrates that petitioner regarded respondent's visual impairment as preventing him from safely performing any job that required DOT certification. See J.A. 345, 396. DOT certification is necessary for "all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. 390.3(a).

¹¹ For similar reasons, petitioner's argument (Br. 26-27) that it could not have regarded respondent as substantially limited in the ability to see because it later offered him a position as a tire mechanic raises factual questions that cannot be resolved on summary judgment. Among other things, the offer came long after the termination, see J.A. 395, and therefore may be of quite limited value in assessing how Riddle regarded respondent at the time that he fired him.

¹² As we explain in our brief (at 13-14) as amicus curiae in *Sutton v. United Air Lines*, No. 97-1943, the "class of jobs or broad range of jobs in various classes" requirement was not intended to impose an onerous burden on plaintiffs, but merely to ensure that the limitation on working is not trivial or insubstantial.

Thus, there is evidence that petitioner regarded respondent as restricted from either a "class of jobs or a broad range of jobs in various classes," 29 C.F.R. 1630.2(j)(3)(i), namely, most of the truck driving jobs for which respondent was trained, and hence substantially limited in the major life activity of working. Accordingly, the record in this case precludes summary judgment for petitioner on the question whether respondent was "regarded as" disabled.

II. PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT RESPONDENT, AS A RESULT OF HIS MONOCULAR VISION, WAS NOT QUALIFIED TO DRIVE A TRUCK FOR PETITIONER

Petitioner argues that the district court correctly granted it summary judgment on the ground that, assuming respondent was disabled, his monocular vision rendered him not "qualified" to serve as a truck driver for petitioner. To the contrary, there are serious issues of material fact that preclude a grant of summary judgment to petitioner on that ground.

A. An Employer May Not Employ Qualification Standards That Tend To Screen Out Disabled Persons Unless Those Standards Can Be Justified Under The ADA

1. Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability." 42 U.S.C. 12112(a). The Act provides that "the term 'discriminate' includes * * * using qualification standards * * * that screen out or tend to screen out an individual with a disability * * * unless the standard, * * * as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6). Correspondingly, the Act provides that "[i]t may be a defense to a charge of

discrimination * * * that an alleged application of qualification standards * * * that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a).

Putting the above provisions together, if a qualification standard is "job-related" and "consistent with business necessity" and if its purpose cannot "be accomplished by reasonable accommodation," then its use by an employer to screen out persons with disabilities is permissible under the ADA. But if a qualification standard is not "job-related" and "consistent with business necessity," or if its purpose can "be accomplished by reasonable accommodation," then its use by an employer to screen out persons with disabilities is discrimination under the ADA and is illegal.

2. Petitioner argues (Br. 33) that it "is not required to justify its decision regarding the stringency of the qualitative standards applied to each position." That argument is inconsistent with the statutory provisions cited above, which plainly require such justification in terms of job-relatedness, business necessity, and reasonable accommodation. Indeed, the perfectly general terms of the cited provisions are applicable to all types of selection criteria, including "safety requirements [and] vision or hearing requirements."¹³ 29 C.F.R. Pt. 1630 App. § 1630.10 (emphasis added). The core purpose of the ADA "to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job," *ibid.*, can be accomplished only by requiring justification for qualification standards that tend to screen out disabled persons.

¹³ See generally, S. Rep. No. 116, 101st Cong., 1st Sess. 37-39 (1989) (Senate Rep.); House Labor Rep. at 70-72; H.R. Rep. No. 485, *supra*, Pt. 3, at 42 (House Judiciary Rep.).

Petitioner asserts (Br. 32-33) that it need not justify its qualification standards because the EEOC has stated that "[i]t is the employer's province to establish what a job is and what functions are required to perform it" and that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards * * * nor to require employers to lower such standards." The EEOC's position about essential functions and production standards, however, is of no relevance to any issue in this case. There is no dispute that, as petitioner states, "driving a truck in interstate commerce is an essential function of the truck driving position" at issue here. Pet. 35. This case accordingly does not present any question concerning how to identify the essential functions of a job.¹⁴ Nor does this case involve any question regarding "production standards," such as the number of hours a day a driver should drive. The case does squarely present the question whether petitioner's qualification standard is, as a matter of law, job-related and consistent with business necessity under the ADA.

¹⁴ Citing 42 U.S.C. 12111(8), petitioner states (Br. 14) that "[t]he ADA expressly recognizes that consideration shall be given to the employer's judgment in determining who is qualified." Section 12111(8), however, provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential," not who is qualified for a job. See also 29 C.F.R. 1630.2(n)(1) (defining "essential functions" as "the fundamental job duties of the employment position"). If this case did involve a dispute about the essential functions of a job, it would be significant that the quoted language requires only that "consideration"—not preclusive effect—be given to the employer's judgment concerning what job functions are essential. See *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 (3rd Cir. 1997) (en banc); *Stone v. City of Mount Vernon*, 118 F.3d 92 (2d Cir. 1997), cert. denied, 118 S. Ct. 1044 (1998); 29 C.F.R. 1630.2(n)(3)(i) ("Evidence of whether a particular function is essential includes, *but is not limited to* * * * [t]he employer's judgment as to which functions are essential.") (emphasis added).

B. The ADA Requires Safety-Based Standards To Be Shown To Be Necessary To Avoid A Direct Threat To Health Or Safety

1. The ADA specifically addresses the subcategory of qualification standards which, like the binocular vision standard at issue here, are based on a safety rationale. The Act provides generally that qualification standards "may be a defense to a charge of discrimination" if they are "shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). The Act further provides that such "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b); see also 29 C.F.R. 1630.2(r). In this context, a "direct threat" means a "significant risk" to the health or safety of others that cannot be eliminated by reasonable accommodation. 42 U.S.C. 12111(3).

Because of the statutory connection between "qualification standards" and the "direct threat" defense, the EEOC reasonably has concluded that a qualification standard based on a safety rationale must satisfy the "direct threat" standards. See 29 C.F.R. Pt. 1630 App. § 1630.15(b) and (c) ("With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the 'direct threat' standard * * * in order to show that the requirement is job-related and consistent with business necessity."). Accordingly, petitioner's binocular vision qualification standard must satisfy the "direct threat" standard. We note, however, that it makes little difference in this case whether the "direct threat" standard or some other explication of "job-related and consistent with business necessity" is used. Under any reasonable understanding of "business

necessity," there remain material issues of fact regarding whether petitioner's binocular vision standard is justifiable.

2. As this Court explained in *Bragdon*, the existence of a significant risk must be based on medical or other objective factual evidence. *Bragdon*, 118 S. Ct. at 2210; see also *School Bd. v. Arline*, 480 U.S. at 287-288. Such consideration may not rely on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of a particular disability or about disabilities generally. See 29 C.F.R. Pt. 1630 App. § 1630.2(r); Senate Rep. at 27; House Labor Rep. at 56-57; House Judiciary Rep. at 45-46. Moreover, the determination of whether an individual poses a safety threat to others requires an individualized assessment of the individual's present ability to perform safely the essential functions of the job. 29 C.F.R. 1630.2(r); 29 C.F.R. Pt. 1630 App. § 1630.2(r). See also *Arline*, 480 U.S. at 287; House Labor Rep. at 56. In enacting the ADA, Congress recognized that employers often wrongly excluded persons with disabilities from employment because of misplaced concerns about safety or liability. See House Judiciary Rep. at 30-31. An employer's subjective belief that a significant risk exists, even if maintained in good faith, therefore will not relieve the employer from liability. See *Bragdon*, 118 S. Ct. at 2210.

C. Petitioner Was Not Entitled To Summary Judgment, Because There Were Significant Issues Of Material Fact Concerning Whether Its Binocular Vision Standard Was Justified

1. There was substantial evidence in the record that respondent's requirement that its truck drivers have binocular vision does not satisfy the ADA. For example, at the time respondent was dismissed, DOT had determined that existing studies "d[id] not provide a sufficient nexus between the current vision requirements and driving per-

formance." See 57 Fed. Reg. 31,459 (1992).¹⁵ According to DOT, there was evidence that persons with disabilities learn to compensate for their disabilities over time, and that past driving experience can be used to predict future results. 59 Fed. Reg. 50,888 (1994) (describing 1992 decision).

Moreover, respondent's optometrist testified that, although stereopsis—the ability to judge depth using both eyes working together—"is * * * limited to the short distances rather than the long distances[,] [w]e rely on other cues for depth at the long-range distances." J.A. 300. She went on to describe those cues, including "motion parallax," "linear perspective," "overlay contours," "distribution of highlights and shadows," the "size of known objects," and "aerial perspective." J.A. 301. She also referred to a scholarly article discussing the issue. J.A. 300. She concluded that "in certain situations like distance viewing," "stereopsis * * * [is] not going to be a really particularly relevant or necessary skill." J.A. 301.

Finally, respondent presented evidence that he had been safely driving commercial vehicles since 1979, that his vision has remained constant, and that he was capable of driving as well as a similarly situated person with good vision in both eyes. J.A. 34-36, 286-287, 305-306. Those facts also support respondent's position.

2. Petitioner does not seriously dispute the above evidence. Instead, both petitioner and the dissenting judge in the court of appeals (J.A. 249-253) rest their argument on the fact that respondent cannot satisfy the DOT vision standards without obtaining a vision waiver. The fact that respondent could satisfy federal standards only by obtaining a waiver,

¹⁵ DOT also cited a 1982 study it had commissioned concluding that there was no correlation between accident rates and reduced visual acuity in drivers under age 54 and only a weak relationship in drivers over 60. 57 Fed. Reg. at 6794 (citing Bartow Associates, Inc., *The Monocular Driver: A Review of Distant Visual Acuity Risk Analysis Data* (1982)).

however, is insufficient to establish that petitioner is entitled to summary judgment on the qualification issue.

a. Under 29 C.F.R. 1630.15(e), "[i]t may be a defense to a charge of discrimination * * * that a challenged action is required or necessitated by another Federal law or regulation." At the time petitioner dismissed respondent, respondent had offered to obtain (and ultimately did in fact obtain) a vision waiver permitting him to obtain DOT certification despite his failure to satisfy the DOT binocular vision standard. Because a waiver would render the vision standard inapplicable to respondent, petitioner's dismissal of respondent was not "required or necessitated" by any "Federal law or regulation."¹⁶ See 29 C.F.R. Pt. 1630 App. § 1630.15(e) ("The employer's defense of a conflicting Federal requirement or regulation may be rebutted * * * by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with [the ADA]."); House Labor Rep. at 74.

The dissenting judge on the court of appeals mistakenly reasoned that petitioner was acting lawfully because it was merely "requiring compliance with DOT safety regulations." J.A. 251. Because DOT safety regulations permitted respondent to drive with a vision waiver, petitioner may not justify

¹⁶ Petitioner does not assert that the delay in obtaining the certification was a factor in its decision to dismiss respondent. If it made such a claim, the question would arise whether petitioner was obligated to permit such a delay as a reasonable accommodation. See 42 U.S.C. 12112(b)(5)(A) (stating that to "discriminate" under the ADA includes "not making reasonable accommodations" under specified circumstances); 42 U.S.C. 12113(a) (recognizing defense that employer was applying qualification standard where, *inter alia*, "performance cannot be accomplished by reasonable accommodation").

its choice to dismiss respondent on the ground that it was merely complying with federal safety regulations.¹⁷

b. Even though the DOT vision standards did not themselves require petitioner to dismiss respondent, petitioner could still employ those standards (or could adopt even more stringent standards of its own) if it could establish that the use of such standards satisfied the "direct threat" defense. The ADA is not intended to prevent employers from guarding against significant health and safety risks that might be posed by employing particular persons with disabilities. See *Bragdon*, 118 S. Ct. at 2210. Moreover, a particular employer may face conditions that demand stricter safety standards than those embodied in the DOT regulations. See J.A. 247 n.11.¹⁸ Cf. *Bragdon*, 118 S. Ct. at 2211 (While the views of public health agencies are entitled to "special weight and authority[,] * * * [a] health care professional

¹⁷ Contrary to the dissenting judge in the court of appeals (J.A. 252), the analysis is not altered by the fact that the federal waiver program was an interim measure limited to a small group of drivers as part of a controlled study to determine whether the regulatory standards should be changed for all drivers. Nothing in federal law suggests that a waiver is invalid because it is issued as part of a controlled study.

¹⁸ The court of appeals erroneously stated (J.A. 248) that "[i]n light of [DOT's] determination that waiver recipients do not pose a threat to public safety, * * * [petitioner] is precluded from asserting that they do." See also J.A. 247 (stating that the waiver program "precludes [employers] from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver [through the waiver program] are incapable of performing that job by virtue of their disability"). Although DOT's views regarding whether those who receive vision waivers may safely drive commercial vehicles should be afforded substantial weight, nothing in the ADA precludes an employer from proving, if it can, that a particular safety standard higher than that required by DOT would be "job-related and consistent with business necessity," i.e., would be necessary to avoid a "direct threat" within the meaning of the ADA. Indeed, DOT regulations expressly permit employers to establish more rigorous qualifications than those mandated by DOT. See 49 C.F.R. 390.3(d).

who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm.").

It is significant that petitioner's binocular vision standard does not recognize DOT-approved waivers, and petitioner's standard in that respect is stricter than the standard embodied in DOT regulations. To justify its adoption of that stricter standard, petitioner may not simply rest on the similarity between its standard and the basic vision standard in the DOT regulations. To the contrary, the defense requires *all* qualification standards imposed by an employer to satisfy the "job-related and consistent with business necessity" or "direct threat" requirements. See Senate Rep. at 37 (Among the "three pivotal provisions to assure a fit between job criteria and an applicant's actual ability to do the job [is] * * * [t]he requirement that *any* selection criteria that screen out or tend to screen out [persons with disabilities] be job-related and consistent with business necessity.") (emphasis added). Aside from the similarity between its standard and the basic DOT standard, petitioner has not offered any basis for a ruling that, as a matter of law, its vision standard satisfies those requirements.

c. The analysis is not altered by the fact that the DOT rule instituting the vision waiver program was later vacated by the D.C. Circuit in *Advocates for Highway & Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (1994). The court in *Advocates* held that the waiver program was invalid "because the agency lacked the data necessary to support its determination that the vision waiver program 'is consistent with the safe operation of commercial motor vehicles.'" Putting to one side the question whether *Advocates* was correctly decided, but see *Rauenhorst v. U.S. Dep't of Transportation*, 95 F.3d 715 (8th Cir. 1996) (reviewing history of vision waiver program and holding that DOT must issue waiver to applicant), that holding, in 1994, could not justify petitioner's dismissal of respondent in 1993.

First, the *Advocates* decision does not suggest that petitioner would have been out of compliance with federal law—or that petitioner would have believed itself to be out of compliance with federal law—if it accepted a vision waiver from respondent. Federal regulations, like other sources of law, are presumed valid until they have been held not to be so, and the proper method for challenging them is generally (as in *Advocates*) by means of an action under the Administrative Procedure Act, 5 U.S.C. 551. As the court of appeals in this case correctly held (J.A. 242), the D.C. Circuit's 1994 decision holding the vision waiver program invalid in *Advocates* cannot be used to justify an employment decision made by petitioner in 1993.¹⁹ Cf. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

Second, the *Advocates* decision does not suggest that summary judgment could be granted to petitioner on the ground that the vision waiver standard was justifiable under the ADA's "direct threat" (or "job-related and consistent with business necessity") standard. The D.C. Circuit's decision at most means that DOT had failed to put in the administrative record sufficient evidence to satisfy what the court believed to be DOT's burden to show affirmatively that the vision waiver program would not result in "any diminution of safety resulting from the waiver." 28 F.3d at 1294 (emphasis added). The fact that DOT had failed to build an administrative record that satisfied the *Advocates* court, however (see note 19, *supra*), does not mean that the vision waiver program permitted unsafe individuals to drive commercial

¹⁹ Indeed, DOT revalidated the vision waiver program after the *Advocates* decision, based in part on evidence that it had gathered in 1992 but not placed in the administrative record. See 59 Fed. Reg. at 50,888. Thus, the vision waivers it has issued during the program remained valid until the program ended in 1996. At that time, drivers in good standing, like respondent, were accorded "grandfather" privileges making the vision standard in 49 C.F.R. 391.41(b)(10) inapplicable to them in the future, as long as they satisfy the conditions stated in 49 C.F.R. 391.64(b).

vehicles; it simply meant that DOT in that case had not justified its conclusion sufficiently to the court. And the fact that DOT failed to build a record sufficient to show the *Advocates* court that monocular drivers admitted to the waiver program may safely drive commercial vehicles does not establish that petitioner, in this case, has built a sufficient record to demonstrate that, as a matter of law, monocular drivers holding DOT waivers would pose a direct threat if permitted to drive commercial vehicles.

Finally, it is significant that petitioner apparently employs binocular drivers who merely satisfied the minimum federal standards, but not monocular drivers who, by obtaining waivers, demonstrated that they satisfied above-minimum standards in other respects. Vision waivers were available only to drivers of commercial vehicles who, during the preceding three years, had no license suspension or revocation, no involvement in a reportable accident, no conviction for a disqualifying offense or more than one serious traffic violation, and no more than two convictions for any other moving violation in a commercial vehicle. 57 Fed. Reg. at 31,460. In addition, waiver applicants were required, *inter alia*, to submit a statement from an optometrist or ophthalmologist certifying that they were able to perform the driving tasks required to operate a commercial motor vehicle. Once admitted to the program, drivers had to be examined by an optometrist or ophthalmologist each year and to submit the result to the Federal Highway Administration. *Ibid.* By contrast, as far as the record in this case shows, the drivers petitioner would have employed in their place would have had less driving experience and worse driving records than those who qualified for vision waivers, and they would not have had the same certifications and annual check-ups by optometrists and ophthalmologists to ensure that their vision had not worsened.

In these circumstances, notwithstanding the *Advocates* decision, petitioner's requirement of binocular vision is valid

only if it could justify employing the binocular drivers who satisfied the minimum standards rather than monocular drivers (like respondent) who had the added safety assurances provided by their satisfaction of the more stringent standards of the vision waiver program. Although it is possible that petitioner could satisfy that burden, nothing in the record would permit a court to conclude that, as a matter of law, petitioner has done so.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC.,

v. *Petitioner,*

HALLIE KIRKINGBURG,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF AMICI CURIAE OF THE
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THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA
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The Equal Employment Advisory Council and The Chamber of Commerce of the United States of America respectfully submit this brief as *amici curiae*.¹ Letters of consent from both parties have been filed with the Court. The brief urges this Court to reverse the decision below, and thus supports the position of Petitioner Albertsons, Inc.

INTEREST OF THE AMICI CURIAE

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the largest federation of business companies and associations in the world. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on employment

¹ Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

law issues of national concern to the business community.

All of EEAC's members and many of the Chamber's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117 (Title I). Many own commercial facilities subject to Title III of the ADA, 42 U.S.C. §§ 12181-12189 (Title III), and many own, operate, lease, or lease to places of public accommodation, also subject to Title III. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. Also, some members are the recipients of federal financial assistance and therefore are subject to the non-discrimination provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 share a common definition of "disability" which establishes the parameters of the protected class under each statute. Both statutes define "disability" in terms of an impairment that "substantially limits" a major life activity. Thus, EEAC's and the Chamber's members have a direct interest in the issues presented in this case; *i.e.*, whether a particular impairment can be a disability *per se* regardless of whether the impairment substantially limits the individual in a major life activity, and whether employers may rely on federal government standards establishing minimum physical criteria, or establish their own standards which may exceed federal standards, in determining whether an individual is a "qualified" individual with a disability.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in numerous cases before this Court, the United States Courts of Appeals, and various state supreme courts. As part of this activity, EEAC participated as *amicus curiae* in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), which addressed the definition of a "disability" under the ADA. EEAC also participated as *amicus curiae* in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and other cases in this Court construing the Rehabilitation Act of 1973. *E.g.*, *Alexander v. Choate*, 469 U.S. 287 (1985), *CONRAIL v. Darrone*, 465 U.S. 624 (1984); *University of Texas v. Camenisch*, 451 U.S. 390 (1981); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Similarly, EEAC and the Chamber have participated in numerous other employment discrimination cases before this Court. *E.g.*, *International Union UAW v. Johnson Controls*, 499 U.S. 187 (1991) (sex discrimination); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (sexual harassment); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (sexual harassment); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (after-acquired evidence); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (age discrimination). Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of their experience in these matters, EEAC

and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Albertsons hired Respondent Kirkingburg as a driver in its distribution center in Portland, Oregon in 1990. *Kirkingburg v. Albertsons, Inc.*, 143 F.3d 1228, 1230 (9th Cir. 1998). Albertsons requires that all of its truck drivers meet the minimum Department of Transportation (DOT) visual acuity standards of 20/40 corrected in each eye. Before Kirkingburg started the job, as well as several months later, examining physicians certified incorrectly that he met the DOT vision standards. *Id.* at 1230 n.2.

In late 1991, Kirkingburg fell from a truck while at work and was injured. Upon his return to work in November of 1992, Albertsons, in accordance with company policy, required Kirkingburg to obtain a current DOT certification. This time, the physician reported accurately that while Kirkingburg's vision was 20/20 corrected in the right eye, it was only 20/200 corrected in the left, thus failing the minimum DOT vision requirements. Based on this report, Kirkingburg was denied DOT certification, and Albertsons refused to reinstate him as a truck driver. *Id.* at 1231.

Several months later, Kirkingburg obtained a "vision waiver" from the DOT under an experimental program designed to obtain empirical data to study drivers with monocular vision. Albertsons, however, did not accept the waiver. *Id.* at 1231. Kirkingburg filed suit under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, alleging that Albertsons had discriminated against him based on his alleged dis-

ability. The district court granted summary judgment for Albertsons. 143 F.3d at 1230. The Ninth Circuit reversed and remanded, holding that (1) Kirkingburg is protected by the ADA because his limited vision renders him an individual with a disability under the ADA; and (2) Albertsons' requirement that truck drivers meet the DOT vision standards without a waiver is invalid. *Id.* at 1237. The Court granted Albertsons' petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The statutory definition of "disability" establishes the scope of the class protected under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* Thus, the first element of the plaintiff's burden of proof in an ADA case is to show that he or she has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(2).

An individualized analysis is always required to determine whether an impairment rises to the level of a disability. *E.g., Baert v. Euclid Beverage*, 149 F.3d 626, 631 (7th Cir. 1998). The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the ADA, agrees that the statute requires such an individualized analysis. 29 C.F.R. § 1630 App. (Section 1630.2(j) Substantially limits). This Court conducted the individualized analysis required by the statute in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), as well as in a case interpreting the Rehabilitation Act, the ADA's predecessor, in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

The requirement of an individualized inquiry precludes any finding that *per se* disabilities can exist

under the ADA. The Ninth Circuit improperly disregarded that requirement when it concluded, based solely on a medical diagnosis, that the Respondent was an individual with a disability protected by the ADA, without determining whether he was *limited* in a major life activity.

Moreover, a ruling that *per se* disabilities can exist under the Act may potentially compromise the rights of those with true disabilities. Congress placed limitations on the length to which employers must go to provide reasonable accommodations by indicating that when doing so becomes an "undue hardship," the employer's obligations end. 42 U.S.C. § 12111(10)(a). If the scope of the protected class is interpreted too broadly, individuals without true disabilities may become entitled to accommodations, at the expense of someone truly in need. Therefore, the Court should not extend the coverage of the ADA to those not substantially limited in a major life activity by allowing *per se* disabilities under the statute.

The ADA permits employers to use physical criteria established by federal regulations or other federal standards to determine whether an individual is a qualified for a job. EEOC guidance supports such a finding. EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IV-16 (1991) (hereinafter EEOC Technical Assistance Manual). Further, employers may utilize physical criteria, even if not contained in a federal government safety standard, to determine who is qualified when safety is at issue, as long as such criteria are job related and consistent with business necessity. See 42 U.S.C. § 12113(a). This Court previously has held that using physical criteria to determine qualifications for a federally

funded program is acceptable under the Rehabilitation Act. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Employers who determine qualifications based on physical criteria should be able to rely on such standards without going through an individualized analysis as to whether the individual poses a direct threat to the health and safety of others. As long as the criteria are job related and consistent with business necessity, such criteria should be allowed under the ADA.

Public policy dictates that employers develop safety standards to protect the safety of the general public. Employers have an affirmative obligation to ensure that employees perform the essential functions of the job in a safe manner. Employers should be permitted to use qualification standards based on physical criteria so long as they are job related and consistent with business necessity. Otherwise, employers risk facing potential penalties under both civil and criminal law. Further, allowing individuals who are unable to meet the physical standards that define the essential functions of a safety-sensitive position to hold such positions places the public at risk. Congress did not contemplate such a result.

ARGUMENT

I. THERE ARE NO *PER SE* DISABILITIES WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT

A. The ADA Requires an Individualized Inquiry to Determine Whether an Individual Has a Disability

Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117, prohibits discrimination in employment against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The ADA defines "disability" as follows:

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

As the courts of appeals have held, the statutory definition of "disability" circumscribes the protected class by establishing a threshold requirement that all potential ADA plaintiffs must meet. Each alleged victim of disability-based discrimination must demonstrate, as the first element of his or her burden of proof, that he or she has a "disability" as defined in the law. *Soileau v. Guilford of Maine*, 105 F.3d 12, 14-15 (1st Cir. 1997); *Wernick v. FRB*, 91 F.3d 379, 383 (2d Cir. 1996); *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1997); *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 50-51 (5th Cir. 1997); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998); *DeLuca v. Winer Indus.*, 53 F.3d 793, 797 (7th Cir. 1995); *Benson v. Northwest Airlines*, 62 F.3d 1108, 1112 (8th Cir. 1995); *Sanders v. Arneson Prods.*, 91 F.3d 1351, 1353 (9th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995); *Gordon v. E.L. Hamm & Assocs.*, 100 F.3d 907, 910 (11th Cir. 1996), *cert. denied*, 118 S. Ct. 630 (1997).²

² Title I of the ADA also prohibits discrimination against an individual "because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). Thus,

The determination as to whether a particular plaintiff is protected by the ADA is an individual one. "The question of whether an impairment constitutes a disability and whether it substantially impairs a major life activity is an individualized inquiry, which must be determined on a case-by-case basis." *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 631 (7th Cir. 1998). Accordingly, "[c]ourts have been careful to distinguish impairments which merely affect major life activities and those which substantially limit major life activities." *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870 (2d Cir. 1998).³

The Rehabilitation Act of 1973, the ADA's predecessor, also requires such an individualized analysis.⁴

although the ADA will protect nondisabled individuals in this instance, this protection still flows from the existence of a disability. Moreover, the ADA generally prohibits retaliation, coercion, intimidation, threats, or interference against any individual who opposes acts that are unlawful under the ADA, who participates in a proceeding under the ADA, who exercises rights granted by the ADA, or who aids or encourages another in doing so. 42 U.S.C. § 12203. Again, however, protection is linked inextricably to disability.

³ As the Chief Justice emphasized in *Bragdon v. Abbott*, "whether [an individual] has a disability covered by the ADA is an individualized inquiry. The Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made with respect to an individual. Were this not sufficiently clear, the Act goes on to provide that the 'major activities' allegedly limited by an impairment must be those of such individual. § 12102(3)(A)." *Bragdon v. Abbott*, 118 S. Ct. 2196, 2214 (1998) (Rehnquist, C.J., concurring in part and dissenting in part). See also *id.* at 2217 (O'Connor, J., concurring in part and dissenting in part).

⁴ The ADA definition of "disability" mirrors the definition of "handicapped individual" that appeared in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, at the time the ADA

"The definitional task cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one—whether the particular impairment constitutes for the particular person a significant barrier to employment." *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986).

The EEOC, the agency charged with enforcing Title I of the ADA, also interprets the statute as requiring an individualized analysis of whether an individual has a disability. In explanatory material accompanying its regulations interpreting Title I of the ADA, the EEOC explains in detail the need for an individualized determination of whether an impairment substantially limits a major life activity:

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability

was passed, and the ADA's legislative history confirms the Rehabilitation Act as the source of the ADA definition. S. Rep. No. 101-116, at 21 (1989); H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 332; H.R. Rep. No. 101-485, pt. 3, at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450.

ity is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. § 1630 App. (Section 1630.2(j) Substantially limits).

The agency's position, that whether a person is an "individual with a disability" depends upon the degree to which the impairment affects the individual's major life activities, is consistent with the statutory language. Indeed, in its Technical Assistance Manual on the ADA, the EEOC stresses that "the determination as to whether an individual is substantially limited must always be based on the effect of an impairment on *that* individual's life activities." EEOC Technical Assistance Manual at II-4 (emphasis in original).

In *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), the Court conducted the necessary individualized analysis to determine that the individual in question was an "individual with a disability" protected by the ADA. First, the Court considered whether Abbott had an "impairment." *Id.* at 2202. Having determined that she did, the Court then considered whether the impairment substantially limited Abbott in a major life activity. *Id.* at 2205. Only then, after considering the medical evidence, did the Court conclude that Abbott was an "individual with a disability" protected by the ADA. *Id.* at 2207.⁵

⁵ Having done so, the Court declined to address specifically whether *per se* disabilities could exist under the ADA. *Id.* at 2207.

Likewise, this Court has conducted the individualized analysis required by the Rehabilitation Act before determining that a plaintiff was covered by the statute. *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), involved a teacher who was terminated because her tuberculosis which had been in remission for twenty years, recurred three times in two years, and the school board feared contagion. *Id.* at 276. This Court's holding in *Arline* was that a person who meets the statutory definition of an individual with a disability is not disqualified from the protected class merely because the disability poses a threat of contagion. As part of its reasoning in *Arline*, however, this Court carefully considered the statutory definition before determining that Arline was a member of the protected class. The Court based this conclusion on the individualized evidence presented by the plaintiff about the extent to which her major life activities had been limited by her impairment. For this reason, the Court ruled, Arline had a "record" of a disability that placed her within the protected class. *Id.* at 281.

Since the ADA requires that an individualized analysis be conducted to determine if an individual has a disability, no impairment can be a disability *per se*. The Fourth and Seventh Circuits both have stated expressly that the ADA covers no disabilities *per se*. *Ennis v. National Ass'n of Business & Educ. Radio*, 53 F.3d 55, 60 (4th Cir. 1995); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 631 (7th Cir. 1998). The Seventh Circuit pointed out that *per se* disabilities cannot exist even when a disease, "as a practical matter" may always be found to be disabling. *Id.* at 631. In *Ennis*, the Fourth Circuit found that:

the plain language of the provision requires that a finding of disability be made on an individual-[by]-individual basis. The term 'disability' is specifically defined, for each of subparts (A), (B), and (C), "with respect to the individual," and the individualized focus is reinforced by the requirement that the underlying impairment substantially limit a major life activity of the individual.

* * * *

Were we to hold that A.J. was disabled under the ADA, therefore, we would have to conclude that HIV-positive status is *per se* a disability. The plain language of the statute, which contemplates case-by-case determinations of whether a given impairment substantially limits a major life activity, whether an individual has a record of such a substantially limiting impairment, or whether an individual is being perceived as having such a substantially limiting impairment, simply would not permit this a [sic] conclusion.

Ennis, 53 F.3d at 60 (emphasis in original) (citations omitted).

The Ninth Circuit failed to make this individualized analysis to determine whether Kirkingburg was substantially limited in a major life activity. Instead, the court found that "the appropriate inquiry in cases such as this is whether, as a result of a physical impairment, the individual is required to perform a major life activity in a different manner from other persons." *Kirkingburg*, 143 F.3d at 1232 n.4. The Ninth Circuit thus ignored the pivotal statutory definition, which requires the court to examine whether an individual is actually limited.⁶

⁶ If the Ninth Circuit had considered whether Respondent's condition substantially limited his major life activities, it might have reached a different conclusion. For example, in

B. Congress Did Not Provide for *Per Se* Disabilities Under the ADA

The legislative history of the ADA supports the interpretation that the Act's protection extends only to those individuals actually limited in a major life activity as a result of an impairment. The Committee Reports state unequivocally that "[a] physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a 'substantial limitation' of one or more major life activities." H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted* in 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22. As the Reports explain, "[a] person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted* in 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22.⁷ Once again, Congress utilized language showing that it intended to protect individuals who were *restricted* as compared to others.

The approach taken by Congress was a functional one, as is evident from the example in the Committee Reports:

Still v. Freeport-McCoran, Inc., 120 F.3d 50 (5th Cir. 1997), the Fifth Circuit conducted the individualized analysis required by the statute and determined that a plaintiff with partial blindness was not an individual with a disability because he was not substantially limited in performing normal daily activities.

⁷ The EEOC adopted these factors to define what is "substantially limiting" in its regulations interpreting Title I of the ADA. See 29 C.F.R. § 1630.2(j) (1) (ii).

A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.

H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted* in 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22. This example confirms that Congress was focusing not on the abstract effects of a given impairment, but on how the individual actually was limited on a functional basis in performing the major life activity.

The Ninth Circuit erroneously focused on the impairment to Kirkingburg's eye, rather than on the extent to which it actually limited him in seeing. The Ninth Circuit's analysis effectively labels monocular vision a *per se* disability, contrary to the language of the statute.

The statutory definition of "disability" mandates an individualized inquiry into whether a physical or mental impairment substantially limits the individual in one or more major life activities. To declare, by judicial fiat, that an impairment is *per se* a disability undermines this important concept. Accordingly, this Court should make clear that there are no *per se* disabilities under the ADA.

C. Recognizing *Per Se* Disabilities Would Compromise the Goals of the ADA

Throughout debate and passage of the ADA, Congressional sponsors reiterated the statute's important goal of extending opportunities to individuals with disabilities. As Senator Harkin stated, "For too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic

and social mainstream of American life. It is time we eliminate these injustices." 135 Cong. Rec. S10711 (daily ed. September 7, 1989). This statement reveals that the purpose of the ADA is to extend statutory protection to those individuals who have disabilities that severely restrict their participation in activities that others enjoy. It is not intended to provide a vehicle for others to obtain protection to which they are not entitled. Creating coverage under the ADA for individuals based merely on the name of an impairment will expand the protected class well beyond the statutory definition, and create substantial problems for employers and employees.

In particular, an overly expansive reading of the protected class could well compromise the rights created by the ADA for those truly in need of statutory protection. The ADA requires that employers provide reasonable accommodation to individuals with disabilities unless doing so would impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(5)(a). While some accommodations, taken alone, will not impose an undue hardship, a number of accommodations in the aggregate may well reach that level. The greater the number of individuals entitled to accommodation, the sooner it is likely that the next person to need an accommodation will be denied one because providing the accommodation would impose an undue hardship on the employer's business.

In addition, an overly broad interpretation of the statutory definition also increases the possibility that the ADA will become a vehicle for employees with poor performance records to seek special rights in the workplace. Commissioner Russell G. Redenbaugh of the U.S. Commission on Civil Rights has voiced these very concerns. In his statement included in the

Commission's 1998 report on the ADA, Commissioner Redenbaugh, a blind individual, suggests that a broad reading of the ADA will impact individuals with disabilities negatively.

An over-expansive application of ADA may create the impression that members of the class it protects become what is termed in human resources jargon "fire proof." The impression (and sometimes the reality) can also be that the "normal" standard (i.e., that if you are disabled and can do the job you are protected by the ADA) becomes distorted to the extent it becomes a tool which an employee may use to become "fire proof."

United States Commission on Civil Rights, *Helping Employers Comply with the ADA* 280 (1998). As another commentator observed: "Both just cause protection and the right to demand reasonable accommodation serve as powerful incentives for individuals to seek protection under the ADA. Employees can obtain protection before their employers have taken adverse employment action." Erica W. Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search For the Meaning of Disability*, 73 Washington L. Rev. 575, 585 (1998).

EEAC's and the Chamber's members have a long history of providing equal employment opportunities for individuals with disabilities, and a strong commitment to nondiscrimination. These exemplary employers support the goals of the ADA as applied to individuals with disabilities. Those goals will become clouded, however, if the expansion of the definition of what constitutes a disability under the ADA is expanded to recognize certain conditions as *per se* disabilities.

II. THE ADA PERMITS EMPLOYERS TO USE PHYSICAL CRITERIA TO DETERMINE WHETHER AN INDIVIDUAL WITH A DISABILITY IS "QUALIFIED"

A. The ADA Permits Employers to Rely on a Federal Regulation or Other Federal Standards With Physical Criteria

Title I of the ADA prohibits discrimination in employment against a "qualified individual with a disability," 42 U.S.C. § 12112(a), defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The employer's judgment as to what functions of a job are "essential" must be considered. *Id.* The ADA explicitly permits an employer to use "qualification standards, tests or selection criteria" even though doing so may screen out individuals with disabilities, provided that the employer can show that the standard, test or criterion is "job related and consistent with business necessity." 42 U.S.C. § 12113(a).

The ADA's legislative history reflects the drafters' concern that government standards established for safety and security sensitive positions be preserved, stating unequivocally that the ADA is not intended to "override any legitimate medical standards established by federal, state or local law, or by employers for applicants for safety or security sensitive positions, if the medical standards are consistent with [the ADA]." H.R. Rep. No. 101-485, pt. 3, at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446; H.R. Conf. Rep. No. 101-558, at 57-58 (1990).

The EEOC's interpretation of the ADA also supports this conclusion. According to the EEOC, "[t]he ADA does not override health and safety require-

ments established under other Federal laws. If a standard is required by another Federal law, an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity." EEOC Technical Assistance Manual at IV-16 (emphasis added). As examples, the EEOC states that "[a]n employee who is being hired to drive a vehicle in interstate commerce must meet safety requirements established by the U.S. Department of Transportation. Employers also must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration." *Id.*

The Rehabilitation Act also permits an employer to rely on federal safety standards. In *Chandler v. City of Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994), plaintiffs contended that the city's Driver Safety Program, which used standards based on Department of Transportation safety regulations that prohibit the employment of drivers with certain vision impairments and insulin-dependent diabetes, violated the Rehabilitation Act. The Fifth Circuit determined that the drivers were unqualified and held as a matter of law that "a driver with insulin-dependent diabetes or with vision that is impaired to the extent discussed in 49 C.F.R. § 391.41 presents a genuine substantial risk that he could injure himself or others." *Id.* at 1395. In concluding that individuals with such impairments could not be qualified because they could not meet the physical qualifications set forth for drivers by the Department of Transportation, the Fifth Circuit relied on the statutory language of the Rehabilitation Act, observing that the "definition of a qualified handicapped individual also includes a personal safety requirement—an otherwise qualified handicapped individual is defined as one who 'can perform the essential func-

tions of the position in question without endangering the health and safety of the individual or others.' " *Id.* at 1393. Indeed, the court warned, "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which is involved in a vehicular accident." *Id.*

Thus, the legislative history, the EEOC's guidance, and the Rehabilitation Act all support the conclusion that employers may use federal safety standards as selection criteria without violating the ADA. Employers need not even demonstrate that the standard is job related and consistent with business necessity. A contrary interpretation of the ADA would compromise the safety of the public and lead to confusion as to an employer's obligation under federal law.

B. The ADA Also Permits Employers to Use Physical Criteria Other Than Federal Standards to Determine Whether an Individual Is Qualified When the Safety of Others Is at Issue

Where appropriate, the ADA also permits employers to use minimum medical criteria as qualification standards even where they are not mandated to do so by law. As noted above, the ADA's legislative history states that Congress did not intend that the ADA "override any legitimate medical standards established by federal, state or local law, or by employers for applicants for safety or security sensitive positions, if the medical standards are consistent with [the ADA]." H.R. Rep. No. 101-485, pt. 3, at 43, *reprinted in* 1990 U.S.C.C.A.N. at 466; H.R. Conf. Rep. No. 101-558, at 57-58 (emphasis added).⁸ In-

⁸ With limited exception, the legislative history reveals that Congress intended to prohibit employers from using standards that resulted in a blanket exclusion of individuals with certain disabilities. This general prohibition is distinct from what Congress *did* intend for employers to utilize, *i.e.*, stand-

deed, "Under the legislation an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity." S. Rep. No. 101-116, at 27.

In explaining what medical examinations for employees might be "job related and consistent with business necessity," the House Labor Committee stated:

Section 102(c)(4) prohibits medical exams of employees unless job related and consistent with business necessity. Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical. Those employees, for example, pilots, may have to meet medical standards established by Federal, State or local law or regulation, or otherwise fulfill requirements for obtaining a medical certificate, as a prerequisite for employment. In other instances, because a particular job function may have a significant impact on public safety, *e.g.* flight attendants, an employee's state of health is important in establishing job qualifications, *even though a medical certificate might not be required by law.*

H.R. Rep. No. 101-485, pt. 2, at 74, *reprinted in* 1990 U.S.C.C.A.N. at 356-57 (emphasis added). Similarly, the Conference Report explains:

ards based on certain physical abilities. *See* S. Lab. Rep. No. 101-116, at 27. This is an important distinction, because standards based on physical abilities address the individual's ability to do a certain essential function of the job, regardless of the type of disability an individual may have.

[I]n certain industries, such as air transportation, applicants for security and safety related positions are normally chosen on the basis of many competitive factors, some of which are identified as a result of post-offer pre-employment medical examinations. Thus, after the employer receives the results of the post-offer medical examination for applicants for safety or security sensitive positions, only those applicants who meet *the employer's criteria* for the job must receive confirmed offers of employment, so long as the employer does not use those results of the exam to screen out qualified disabled individuals on the basis of disability.

H.R. Conf. Rep. No. 101-558, at 59 (emphasis added). Hence, the legislative history also supports an employer's use of physical criteria beyond those promulgated by the federal government to determine qualifications to perform the essential functions of the job as long as the criteria are job related and consistent with business necessity.

The EEOC also confirms that an employer can use physical standards to determine job qualifications. In its interpretive guidance accompanying its ADA regulations, the agency specifically ties the statutory provision allowing employers to use selection criteria that are "job related and consistent with business necessity" to selection criteria such as "safety requirements, vision or hearing requirements, walking requirements, [and] lifting requirements" 29 C.F.R. § 1630 App. (Section 1630.10 Qualifications, Standards, Tests and Other Selection Criteria).⁹

⁹ Thus, it would be inaccurate to subject such physical qualification standards to the more stringent "direct threat" analysis of 42 U.S.C. § 12113(b). Congress took the "direct threat" standard, which requires an individualized analysis, from *School Board of Nassau County v. Arline*, 480 U.S. 273

The statutory language and legislative history cited above strongly indicate that Congress could not have meant for an individualized analysis to be conducted every time a qualification standard is at issue. The meaning of "standard" is "an acknowledged measure of comparison for quantitative or qualitative value." The American Heritage Dictionary (2d ed. 1982). The whole point of setting qualification standards is to be able to compare individuals, regardless of whether they have disabilities, by some objective measure that the employer ties to the function and purpose of the job. The standards themselves cannot, if employers are expected to run businesses, be analyzed on a case by case basis. Indeed, "[o]nce an individual has admitted that he does not meet such a necessary—as opposed to a merely convenient—standard, the Rehabilitation Act does not forbid the application to him of a general rule." *Buck v. DOT*, 56 F.3d 1406, 1408 (D.C. Cir. 1995) (upholding the Federal Highway Administration's decision to decline to waive its hearing requirements and allow deaf individuals to drive). See also *Ward v. Skinner*, 943 F.2d 157, 162-164 (1st Cir. 1991) (upholding Secretary of Transportation's denial of waiver of DOT rule excluding individuals with history of epilepsy from

(1987), in which this Court remanded the question of whether a school teacher with tuberculosis was "otherwise qualified" for her position despite the contagion, and required an individualized inquiry into the nature, duration, severity and probability of the risk. *Id.* at 288. The rationale behind the use of an individualized "direct threat" analysis in this context is to prevent employers from making employment decisions based on unfounded stereotypes associated with certain types of disabilities. The use of physical criteria to set job qualifications, however, does not require this individualized analysis, because its focus is tied to the skills necessary to achieve the purpose and function of the job, as opposed to the traits associated with a certain disability.

driving commercial vehicles to plaintiff who had not experienced seizure in seven years), *cert. denied*, 503 U.S. 959 (1992).

This Court previously has recognized that standards utilizing physical criteria to select qualified applicants for participation in a federally-funded program are acceptable in an analysis of the Rehabilitation Act. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), this Court held that an individual with a hearing disability was not qualified to participate in a nursing program due to the fact that she could not communicate effectively in the program. Noting that “[a]n otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap,” *id.* at 407, this Court found that physical qualifications may be part of the program’s requirements, observing that “[n]othing in the language or history of § 504 [of the Rehabilitation Act] reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program.” *Id.* at 415.

In *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff’d*, 865 F.2d 592 (3d Cir. 1989), the Eastern District of Pennsylvania also approved the use of physical criteria to define qualification standards under the Rehabilitation Act. The court reviewed a Federal Bureau of Investigation (FBI) policy that excluded all individuals with insulin-dependent diabetes from special agent and investigation specialist positions.¹⁰ The court rejected the notion that an in-

¹⁰ It is important to note that this qualification standard did not exclude all individuals with a certain disability. Rather, it applied only to those with insulin-dependent diabetes.

dividualized analysis should be conducted, since “there exists no reliable method of determining in advance those insulin-dependent diabetics who do not present a substantial risk of having a sudden and unexpected severe hypoglycemic episode while on a duty assignment.” *Id.* at 517.

In concluding that this policy did not violate the Rehabilitation Act, the district court judge explained why physical criteria used to establish job qualifications need not pass muster under an individualized analysis:

... Congress’ intent in enacting the Rehabilitation Act was not that employers must accept applicants for jobs where eminently qualified medical specialists are of the opinion that the job requirements pose a reasonably probable risk of harm to the applicant and others by reason of the applicant’s “handicap,” in this case being that of an insulin-dependent diabetic. Where, as here, qualified medical opinion is divided as to what is an acceptable degree of risk, a decision must be made.

Id. at 520.

This Court first used the phrases “business necessity” and “related to job performance” to establish the employer’s burden in justifying selection criteria with an adverse impact on a protected class under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971).¹¹

¹¹ Since then, the *Griggs* standard was codified by the Civil Rights Act of 1991, which amended Title VII to provide that “[a]n unlawful employment practice based on disparate impact is established under this subchapter only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the

Since *Griggs*, the courts of appeals have applied this rule in cases involving challenges to safety-related qualification standards. For example, in *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993), the Eleventh Circuit examined the City of Atlanta's safety rule banning firefighters from wearing even closely-shaved beards—because facial hair interferes with the tight seal necessary for proper operation of a respirator or self-contained breathing apparatus (SCBA). *Id.* at 1114. The plaintiffs alleged that such a policy had a disparate impact on African-American males, who suffer disproportionately from a bacterial disorder that precludes them from shaving their faces. In finding that the City's policy was consistent with business necessity, the court held that "these safety claims would afford the City an affirmative defense, for protecting employees from workplace hazards is a goal that, as a matter of law, has been found to qualify as an important business goal for Title VII purposes." *Id.* at 1119. As the Eleventh Circuit explained, "[m]easures demonstrably necessary to meeting the goal of ensuring worker safety are therefore deemed to be 'required by business necessity' under Title VII." *Id.*

In analyzing this issue, the Eleventh Circuit captured the important policy reason why such safety standards should be considered consistent with business necessity: "The mere absence of unfortunate incidents is not sufficient to establish the safety of shadow beards; otherwise, safety measures could be instituted only once accidents had occurred rather than in order to avert accidents." *Id.* at 1121. Although the city was not required to comply with

respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity" 42 U.S.C. § 2000e-2(k) (1) (A) (i).

Occupational Safety and Health standards, the court looked to OSHA, National Institute for Occupational Safety and Health, and American National Standards Institute standards, which are voluntary private industry standards, as validation for the safety reasons behind the City's policy. The court further found that the plaintiffs were unable to show a less discriminatory alternative that would meet the City's legitimate business need. *Id.* at 1122.

The Eleventh Circuit also rejected the plaintiffs' argument that the policy violated the Rehabilitation Act, based on its analysis under Title VII:

Because of the conceptual similarity between the Title VII less discriminatory alternative and the § 504 reasonable accommodation showings, this same evidence suffices to carry the City's initial burden of showing that there exists no reasonable accommodation that would permit the firefighters to perform the essential function of obtaining a safe seal on their SCBA's without being clean shaven.

Id. at 1127.

In addition to determining when facially neutral selection criteria are consistent with "business necessity" under Title VII in disparate impact cases, the courts also have addressed whether employers can intentionally exclude against an individual based on a protected characteristic such as age or sex based on a safety-related bona fide occupational qualification ("BFOQ").¹² This Court previously has acknowl-

¹² Under Title VII, classifications based on religion, sex, or national origin are allowed "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e) (1). This same principle is applicable to the Age Discrimination in Employment Act. 29 U.S.C. § 623(f) (1).

edged that the "business necessity defense" under Title VII (which is the applicable standard under the ADA) is "more lenient for the employer than the statutory BFOQ defense" under Title VII. *International Union UAW v. Johnson Controls*, 499 U.S. 187, 198 (1991). In *Dothard v Rawlinson*, 433 U.S. 321 (1977), this Court found that women could be excluded from prison guard positions in an all-male maximum security prison because the "likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel." *Id.* at 335. Similarly, in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), this Court endorsed the use of a two part safety BFOQ defense in a case involving age related safety standards for flight engineers, although affirming the appellate court's ruling that the BFOQ standard was not met.¹³

Thus, even when an employer is intentionally targeting a certain protected group, this Court has found that safety standards are allowed when safety concerns are at issue. The use of physical criteria, however, does not intentionally target individuals with disabilities, nor are they a proxy for some qualifica-

¹³ This Court rejected a BFOQ safety defense in *Johnson Controls*, in which the employer excluded fertile women from jobs that involved lead exposure. One primary reason for doing so, however, was this Court's finding that customer safety was not at issue in the case, observing that the "[t]he unconceived fetuses of Johnson Controls' female employees, are neither customers nor third parties whose safety is essential to the business of battery manufacturing." 499 U.S. at 203. This Court further noted that the employer did not present medical evidence to substantiate a real risk to the unborn fetuses. *Id.*

tion standards as age or sex were used in the cases discussed above. Therefore, this Court should permit employers to use physical criteria as qualifications as long as they are job related and consistent with business necessity.

C. Public Policy Dictates That Employers Be Permitted to Develop and Apply Adequate Standards to Protect the Safety of the Public

It is difficult to believe that Congress through passage of the ADA intended to discourage the development of safety standards in the workplace. A ruling that employers cannot set qualification standards that are job related and consistent with business necessity to compare qualified applicants or employees could achieve just such a result. It is an important goal that businesses and industries collectively attempt to self-regulate in the interest of public safety. Businesses may not, however, continue to make the effort to participate in self-regulation if such efforts will actually result in legal liability. Punishing employers who adhere to legitimate safety standards will create a disincentive to maintain needed safety standards.

Public policy dictates that employers be permitted to develop and apply safety standards to determine if an employee is qualified. Employers face bad publicity if they are perceived as endangering the safety of the general public. In addition, both private citizens and the government can sue employers if an employer's actions compromise the safety of the public, or even natural resources.

A highly publicized incident that demonstrates this reality is the *Exxon Valdez* accident. Because of its obligations under the ADA and the Rehabilitation Act, Exxon placed an individual with an alcohol problem in charge of a ship after he successfully completed

a rehabilitation program. Jon Cheney, *EEOC v. EXXON Corp.: Will Exxon's Blanket Exclusion of Former Substance Abusers Hold Up Under the ADA?* 48 Baylor L. Rev. 549, 550 (1996). After the ship hit a reef and starting spilling oil, Exxon "spent \$2.5 billion dollars cleaning up the accident. Settling with federal and state authorities for criminal charges and civil libalities cost Exxon another \$1 billion. And in 1994, an Alaska jury found Exxon reckless and assessed record punitive damages of \$5 billion." *Id.*

Employers must take preventive measures to ensure that employees are able to perform the essential functions of the job in a safe manner. An employer that fails to do so will have a difficult time convincing a jury that it should not be accountable for damages because it was fulfilling its obligation under the ADA. While compliance with the ADA, as a federal law, may in theory preempt a state tort law claim as this Court discussed in *Johnson Controls*, once an accident has occurred, it will be difficult for an employer to show that it could not tell at the time that imminent danger was possible when standards, designed to show what criteria are necessary, were available. *See Johnson Controls*, 499 U.S. at 209. Indeed, Justice White's concurring opinion notes, "it will be difficult for employers to determine in advance what will constitute negligence." *Id.* at 215.

CONCLUSION

For the foregoing reasons, *amici* Equal Employment Advisory Council and The Chamber of Commerce of the United States of America respectfully submit that the decision below should be reversed.

Respectfully submitted,

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CLERK

In The
Supreme Court of the United States

October Term, 1998

ALBERTSON'S INC.,

v.

Petitioner,

HALLIE KIRKINGBURG,

Respondent.

VAUGHN L. MURPHY,

v.

Petitioner,

UNITED PARCEL SERVICE,

Respondent.

KAREN AND KIMBERLY SUTTON,

v.

Petitioners,

UNITED AIRLINES, INC.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth And Tenth Circuits

BRIEF OF SENATORS HARKIN AND KENNEDY,
REPRESENTATIVES HOYER AND OWENS AND
FORMER SENATOR DOLE AS AMICI CURIAE
IN SUPPORT OF RESPONDENT KIRKINGBURG
AND PETITIONERS SUTTON AND MURPHY

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INTEREST OF AMICI*

The following Senators and Congressmen were primary authors and sponsors of the Americans with Disabilities Act and have been leaders in shaping this nation's disability policy.

Former Senator Bob Dole, a war veteran with a disability, was a key proponent of securing equal opportunity for people with disabilities during his years in the Senate, including playing a leadership role in the development of the ADA.

Senator Tom Harkin was the chief sponsor and a principal author of the ADA. As Chair of the Subcommittee on Disability Policy of the Senate Committee on Labor and Human Resources, and floor manager, he was involved in all aspects of the passage of the ADA.

Congressman Steny Hoyer was the lead House co-sponsor of the ADA. He led the House passage of the legislation and was intimately involved in all aspects of its consideration.

Senator Edward Kennedy, a principal author of the ADA, was the Chair of the Senate Committee on Labor and Human Resources during its passage.

Congressman Major Owens was Chair of the Subcommittee on Select Education of the Committee of Education and Labor during the deliberations on the ADA and was involved in all deliberations in the House.

Amici, current and former members of Congress, file this brief on behalf of the petitioners in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997) and *Murphy v. United Parcel Service*, 141 F.3d 1185 (10th Cir. 1998) and the respondent in *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) in order to address the issues raised about the proper analytical framework for deciding whether an individual is "disabled" for purposes of Americans with Disabilities

* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Act (ADA) coverage.¹ *Amici* are deeply concerned by the growing trend in the lower courts to use what was intended as a broad statutory definition of disability to cut off exactly the types of claims the ADA was designed to address. Closing the door at the threshold coverage stage not only denies protection to millions of Americans that Congress sought to protect but also condones exactly the conduct Congress intended to eliminate.

Amici take no position in this brief on the issues raised about job qualifications. Rather, this brief focuses on the common issue in these cases, which is that individuals who are being denied employment because of their impairments are being barred from an opportunity to demonstrate their qualifications by being stripped of coverage under the ADA. The rationale established in these cases will have a profound impact on the future viability of the ADA for individuals with a wide variety of other medical conditions – including diabetes, epilepsy, mental illness, and cancer – that Congress clearly intended to be included under the ADA's definition of disability.

SUMMARY OF THE ARGUMENT

The fundamental purpose of the ADA is "to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities" 42 U.S.C. § 12101(b)(1). This purpose has been eroded by restrictive interpretations of the threshold requirement in any ADA suit, that plaintiff be an "individual with a disability." Dismissals, often at the summary judgment stage, preclude plaintiffs who

¹ It is important to note that although the cases currently before the court arise in the employment context under Title I of the ADA, the definition of disability contained in 42 U.S.C. § 12102(2) applies to Title II (state and local governments) and Title III (public accommodations) as well. If the restrictive interpretations developed in the lower courts in Title I employment cases are sustained by this court, it will be difficult for any individual whose impairment is responsive to medication or other assistive device to bring an action under Titles II or III.

have been rejected because of their physical or mental impairments from ever having the opportunity to show that they are qualified for the job.

As this Court recently recognized in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), the definition of disability in the ADA is patterned after the definition in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.) In enacting the ADA, Congress was well aware that the definition was broad and not limited to traditional disabilities. Congress was guided by this Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which recognized that the breadth of the definition reflected Congress' desire to address a variety of situations where a physical or mental impairment is used to foreclose participation in the community, including working. As the Court stated: "[t]he Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments; the definition of [disability] is broad, but only those individuals who are both [disabled] and otherwise qualified are eligible for relief." *Arline* at 284-285.

The Tenth Circuit opinions in *Sutton* and *Murphy* unduly restrict the definition of disability by refusing to defer to consistent agency interpretations and legislative history which states that in evaluating whether an impairment substantially limits a major life activity, the impairment must be evaluated without regard to mitigating measures. Since the language of the statute is at least ambiguous, a court "may not substitute its own construction . . . for a reasonable [agency] interpretation." *Chevron, USA Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Indeed, an employer who refuses to consider the mitigating measure when it rejects the plaintiff based on the underlying impairment should not be able to use the success of the mitigating measure to defeat ADA coverage. Moreover, the agencies' interpretation is more in tune with the actual nature of mitigating measures. For example, while epilepsy, diabetes and mental illness are subject to mitigation through medication, the relative degree of success varies not only from

person to person, but for any given individual it depends on a number of variables. The changing nature of the effectiveness of medicines and other assistive devices over time makes an "impairment with mitigation" rule unstable and inconsistent.

If this Court decides that mitigating measures should be taken into account for purposes of determining whether an impairment is actually "substantially limiting," then an alternative basis for coverage is the "regarded as" prong of the disability definition. 42 U.S.C. § 12102(2)(C). As this Court recognized in *Arline*, Congress intended to address exclusionary practices based on medical conditions by including in the definition of disability people whose impairments are not substantially limiting, but who nevertheless are substantially limited by the "negative reactions of others to the impairment." 480 U.S. at 283. The lower courts, as illustrated by the Tenth Circuit here, have effectively repealed the "regarded as" prong by requiring that plaintiffs be actually substantially limited in order to be regarded as such. Moreover, in the employment context, courts are routinely granting summary judgment on the grounds that rejection from a "single job" does not mean that the employer regarded the plaintiff as substantially limited in working. In so doing, the courts are creating burdens for plaintiffs which are often illogical and insurmountable. The proper approach is for the employer's rejection to be given its natural meaning, which is that the employer regards the plaintiff as unable to do the tasks involved in the type of job for which the plaintiff was rejected. In most cases, this will, at a minimum, raise a genuine issue of fact as to whether the employer regarded the plaintiff as substantially limited in working.

The overly restrictive interpretations given to the definition of disability have resulted in the dismissal of ADA claims for plaintiffs with a wide variety of disabilities that Congress explicitly intended to cover. Being "disabled" within the meaning of the ADA does not mean the plaintiff wins. The plaintiff must still show that he or she was discriminated against on the basis of disability and is qualified to perform the essential functions of the job. 42 U.S.C. § 12112; 42 U.S.C. § 12111. As this Court stated in *Arline*, 480 U.S. at

284, exclusion at the coverage stage leaves these individuals "vulnerable to discrimination on the basis of mythology . . . precisely the type of injury Congress sought to prevent."

ARGUMENT

I. THE DEFINITION OF DISABILITY IS BROAD IN ORDER TO ACHIEVE THE NON-DISCRIMINATION GOALS OF THE ADA.

During congressional hearings concerning the ADA, Congress learned that employers routinely used employment criteria based on physical and mental characteristics to deprive otherwise qualified individuals of the opportunity to work.² The Senate Report stated:

The requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear during the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still persuasive today.³

² The findings and purposes section of the ADA, 42 U.S.C. § 12101(a)(5) (1990) cites "exclusionary qualification standards and criteria" as a type of discrimination continually faced by people with disabilities. See Senate Comm. on Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., at 9-10 (1989) [hereinafter Senate Report] (citing testimony enumerating major categories of job discrimination faced by people with disabilities including: use of standards and criteria that have the effect of denying opportunities; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism and acceptance by coworkers; and use of application forms and other pre-employment inquiries that inquire about the existence of disability rather than about the ability to perform the essential functions of the job).

³ *Id.* at 37.

Congress concluded that exclusion on the basis of physical or mental impairments was not only harmful to the self-sufficiency and dignity of the individual, but to society as a whole.⁴ Just as Congress sought to eradicate policies that discriminated on the basis of race and sex when it enacted Title VII of the Civil Rights Act of 1964,⁵ so too did Congress seek to remove the vestiges of exclusionary, irrational policies based on physical or mental impairments when it enacted the ADA.⁶

Congress thus defined the class to be protected under the ADA broadly, defining an "individual with a disability" as a person who (a) has a physical or mental impairment that substantially limits one or more major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2). By passing through the initial threshold requirement of establishing that he or she has a disability under the ADA, however, a plaintiff has only satisfied one part of a three-part *prima facie* case

⁴ 42 U.S.C. § 12101(a)(9) ("the continuing existence of unfair and unchanging discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses from dependency and nonproductivity"); Senate Report at 16-17 ("The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year."); 136 Cong. Rec. S10,713 (1990) (statement of Sen. Harkin quoting Attorney General Richard Thornburgh) ("We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country").

⁵ 42 U.S.C. 2000e-2 through -17 (1994); S. Rep. No. 872, 88th Cong., 2d Sess. at 23 (1964) ("The pledge of this Nation is to secure freedom for every individual" and "that pledge will be furthered by the elimination of [discriminatory] practices").

⁶ Congress sought to address pervasive discrimination based on "stereotypic assumptions," 42 U.S.C. § 12101(a)(7) through a "... comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1).

under the ADA. The plaintiff must *also* show that he or she is qualified to perform the essential functions of the job, and that he or she was excluded from employment because of his or her disability.⁷ The proper approach to this three-part *prima facie* case is to broadly interpret the definition of disability, so that a fact-specific inquiry into the individual's qualifications can be pursued.

As the Supreme Court stated in *Arline*, 480 U.S. at 284-285 (1987), about the virtually identical definition of disability under the Rehabilitation Act, "[t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of handicapped individuals is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief."⁸

The unduly narrow interpretation of the definition of disability illustrated by the Tenth Circuit opinions in *Sutton* and *Murphy* perpetuates a Catch-22 that was not contemplated

⁷ See e.g., *Lawrence v. National Westminster Bank of N.J.*, 98 F.3d 61, 68 (3d Cir. 1996); *Olson v. General Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996).

⁸ As this Court stated in *Braddon v. Abbott*, 118 S. Ct. 2196, 2201 (1998), "[t]he ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.) . . . Congress' repetition of a well-established term carried the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." Section 504 case law consistently recognized individuals with impairments subject to mitigation or who were asymptomatic as covered by Section 504. *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (epilepsy); *Mantolite v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (seizure disorder); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989), (insulin dependent diabetes); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989), (asymptomatic hepatitis B). See also, *Braddon* at 2208 (listing section 504 cases covering individuals with asymptomatic HIV infection).

by Congress. Defendants are excluding individuals because of physical or mental impairments and then claiming that the rejected applicant or employee is not covered by the ADA because he or she is not disabled. In other words, the plaintiff is too disabled to do the job, but not disabled enough to be protected by the ADA.

For example, UPS argued that Mr. Murphy should not be able to claim that he was both substantially limited and qualified.⁹ The Tenth Circuit affirmed the district court's view that the plaintiff should not "have it both ways" or withstand a motion for summary judgment based on "such inconsistent positions."¹⁰ This is where the Tenth Circuit gets it exactly wrong. It was Congress' intent not to let *employers* "have it both ways". It was Congress' intent to disallow *employers* from obtaining summary judgment based on these "inconsistent positions" that motivated Congress to enact an expansive definition of disability under the ADA.

Instead of allowing the cases to proceed on the merits of whether an individual is qualified, the courts are fusing these two distinct inquiries of (1) whether plaintiff is a "person with a disability" and (2) whether the plaintiff is qualified to do the job, and penalizing plaintiffs for taking what is characterized as "inconsistent positions." The whole premise of the ADA is that individuals can be both "disabled" and able at the same time. The three prong definition of disability is not meant to be a legalistic trap but instead was drafted to convey the wide range of situations where impairment status is the subject of discriminatory action. This Court's understanding and explanation of this Congressional intent in *Arline* has been virtually ignored by the lower courts.

⁹ The District Court stated: "To demonstrate that he is disabled, Murphy sets forth several of the serious consequences which can result from his high blood pressure. Then in subsequent section of his brief, Murphy, in an effort to demonstrate that he is qualified for the position at UPS, essentially argues that his high blood pressure posed no threat or obstacle to the performance of his duties as mechanic. *Murphy*, 946 F. Supp. 872, 878 (1996).

¹⁰ *Id.* at 878-879.

There can be no doubt that Congress did not intend medical and technological advancements which mitigate the effect of impairments enabling independence and self sufficiency to strip individuals with physical or mental conditions of protection under the first prong of the definition of disability. Moreover, Congress was not only concerned with protecting people with actual disabilities but also with prohibiting employers from using arbitrary medical criteria as the basis for excluding individuals with physical or mental impairments. The "regarded as" prong of the ADA was enacted so that employers cannot "have it both ways."

II. CONGRESS MADE CLEAR ITS INTENT THAT THE FIRST PRONG OF THE DEFINITION OF DISABILITY BE DETERMINED WITHOUT CONSIDERATION OF MITIGATING MEASURES.

The only plausible interpretation of the plain language of the ADA, the legislative history and agency interpretations is that coverage under the first prong of the definition of disability must be decided without reference to mitigating factors.

A. The Plain Language.

The first prong of the statutory definition of disability states that "[t]he term disability" means, with respect to an individual – a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The purpose of the phrase "substantially limits one or more major life activities" is to distinguish minor, trivial impairments, from those that have a significant impact on a person's life.¹¹ By prohibiting discrimination against people who fall within the first prong of the definition of disability, Congress intended to protect individuals with significant impairments from being discriminated against on the basis of those impairments.

¹¹ As stated in the Senate Report, "Persons with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity." Senate Report at 23; House Report (II) at 52.

The plain language of the statute simply looks at whether the impairment substantially limits a major life activity. Requiring a court to look at the impairment in its mitigated state (*i.e.*, after the individual has taken medication or used a prosthetic device) would undermine the purpose of the first prong, which is to prohibit discrimination on the basis of the impairment itself. In *Bragdon*, Justice Ginsburg stated that "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination where the disease, though present, is not yet visible." *Bragdon*, 118 S. Ct. at 2214. It would make just as little sense to prohibit discrimination on the basis of an impairment where the impairment is not ameliorated by mitigating measures, but to permit discrimination on the basis of the very same impairment simply because the individual with the impairment is taking medication or using a prosthetic device.

A rule which relies on mitigating measures is also problematic from a practical point of view. While there have been great strides in medications to help mitigate the effects of a variety of disabilities, factoring in mitigating measures adds often unpredictable and ever changing variables. Most people with conditions that rely on medication are constantly readjusting their doses and prescriptions, with more or less success. If the "disability" determination was contingent on the success or failure of mitigating measures, someone could be covered by the ADA one month and not the next.

For example, insulin, food, and exercise are mitigating measures persons with diabetes can use to achieve health and independence.¹² However, even the most stringent awareness and the most diligent balancing of these factors cannot eliminate the inherent limitations of diabetes.¹³ Blood sugar levels, and, therefore, insulin needs, unpredictably respond to external forces such as stress, allergies, and illness.¹⁴ While one

¹² American Diabetes Association, *Medical Management of Type 1 Diabetes*, 60 (3d ed. 1998).

¹³ *Id.* at 60-61, 71-72.

¹⁴ *Id.* at 73, 77-79, 82.

may know how much insulin to administer to maintain a healthy blood sugar range in the normal course of a normal day, one cannot know how much insulin to give to ameliorate the effects of uncontrollable external forces. *Id.* at 61, 71-72, 76.

Like diabetes, mental illnesses fluctuate in severity over time.¹⁵ Moreover, medications like Lithium for bipolar disorder and Risperdol for schizophrenia help control the most severe symptoms of these disorders, but they do not cure them.¹⁶ In fact, it is very common for people with bipolar disorder to remain stable on Lithium for extended periods of time, only to deteriorate and require intensive interventions to stabilize their Lithium levels.¹⁷ Moreover, psychiatric medications, particularly the more powerful psychotropics, have strong side effects that, in some instances, can be debilitating in and of themselves.¹⁸

Likewise, while the majority of people with epilepsy have their seizures controlled through medications,¹⁹ there are few who can maintain complete control at all times. Approximately fifty percent of the 2.3 million people with epilepsy achieve good control through current therapies.²⁰ Another 30

¹⁵ Fuller Torry, M.D., *Surviving Schizophrenia*, 189 (3rd ed. 1985), ("Both schizophrenia and diabetes have relapses and remissions in a course which often lasts over many years, and both can be well controlled, but not cured, by drugs").

¹⁶ National Alliance for the Mentally Ill, *Understanding Manic Depression* (1997); National Alliance for the Mentally Ill, *Understanding Schizophrenia* (1997).

¹⁷ Frederick K. Goodwin, M.D. & Kay Redfield Jamison, Ph.D., *Manic Depressive Illness* 597 (Oxford University Press 1990).

¹⁸ Richard S. Keefe & Phillip D. Harvey, *Understanding Schizophrenia* 437-440 (The Free Press 1994).

¹⁹ Epilepsy Foundation of America, *Epilepsy: A Report to the Nation* (1999).

²⁰ R.S. Fisher, et al., A Large Community-Based Survey of Quality of Life and Concerns of People with Epilepsy: Part 1, *Epilepsia* Vol. 39, Supp. 6 (1998).

percent achieve partial control, and the rest have seizures that cannot be controlled through any current treatment.²¹ There may be a period of weeks, months, or even years, where seizures are well controlled, and then seizures may recur.²²

Breakthrough seizures, even among people on medications, can occur for any number of reasons, but commonly include illness,²³ lack of sleep,²⁴ hormonal or metabolic changes,²⁵ and changes in medications.²⁶ Moreover, anti-seizure medication may also cause side effects that have varying degrees of impact on individuals' daily lives.²⁷ Because of side effects, people with epilepsy struggle with finding the right medication, in the smallest possible dose, to maintain seizure control, while obtaining optimal functioning.²⁸

²¹ *Id.*

²² *Id.*

²³ N. Santilli, Selection and Discontinuation of Antiepileptic Drugs, in *Managing Seizure Disorders: A Handbook for Health Care Professionals*, edited by N. Santilli, Lippincott-Raven Publishers, Philadelphia 1996.

²⁴ Schachter, S. Treatment of Seizures, in *The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide*. Edited by Steven C. Schachter, and Donald L. Schomer, Academic Press, San Diego 1997.

²⁵ Herzog AG, Klein P., Ransil BJ, Three patterns of catamenial epilepsy, *Epilepsia*, 1997;38:1082-1088.

²⁶ *Supra* n.21.

²⁷ *Id.*

²⁸ Devinsky, Orrin, Antiepileptic Drug Therapy, in *Guide to Understanding and Living with Epilepsy*. F.A. Davis & Co., Philadelphia, 1994.

Epilepsy, diabetes, and mental illness are repeatedly referenced in the legislative history as conditions which Congress intended to cover in the ADA. (epilepsy) Senate Report at 22, 31, 39, 62, House Comm. On Education and Labor, H.R. Rep. No. 985 (II), 101st Cong., 2d Sess. at 51, 52, 62, 72, 79, 80 (1990) [hereinafter House Report (II)], House Comm. On the Judiciary, H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. at 28, 29, 33, 42, 50 (1990) [hereinafter House Report (III)]; (diabetes) Senate Report at

Just as an individual could be disabled one month and not the next, two individuals with the exact same impairment could be "disabled" or not, depending on, among other things, their level of responsibility and commitment to a medical regimen and access to good medical care. Ironically, the more disciplined individual would be unable to invoke ADA protection if discriminated against based on the underlying impairment, while the less disciplined counterpart could invoke the ADA's protections. This simply does not make sense.

The next logical step in this line of reasoning could even be that in determining coverage under the ADA, courts would have to inquire whether the effects of the impairment could be controlled if the individual was more vigilant, had a better doctor, was better educated about the consequences of failing to follow a medical regimen, etc. There is no natural stopping point in the proposition that mitigating measures should be considered in determining first prong coverage. Never would this Court have anticipated that when it stated in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1984) that "technological advances can be expected to . . . qualify [people with disabilities] for . . . employment," that those same technological advances would be used to strip plaintiffs of coverage under the ADA.²⁹

B. Given that the Plain Language is At Least Ambiguous, The Court Should Defer to Explicit Legislative History and Authoritative Agency Interpretations.

When drafting the ADA, Congress explicitly considered the issue of mitigating measures, and consistent with the

22, House Report (II) at 51-52, House Report (III) at 42; (mental illness) Senate Report at 39, 62, House Report (II) at 72, 79, House Report (III) at 28.

²⁹ Like *Arline*, *Southeastern* interpreted the ADA's predecessor statute, Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794 (1988 ed.).

intent that coverage be broad, concluded that mitigation should not be considered in determining first prong coverage.³⁰ For instance, the House Committee on Education and Labor declared that:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

House Report (II) at 52.

³⁰ In addition to the authoritative Committee Reports discussed below, there is also ample evidence in the legislative record that Congress intended individuals who took medicine to ameliorate the effects of impairments to be covered by the ADA. See 135 Cong. Rec. S10765, S10766 (Sept. 7, 1989) (statement of Senator Harkin):

[I]f the disability would affect the performance of that person's job . . . then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive, or whatever it might be, is, let us say, controlled by drugs, the person is under a doctor's care, and the person is qualified for the job . . . [then] the employee would be able to go to the EEOC and file a complaint . . .

See also Statement of Senator Domenici, *Id.* at 10779.

[T]here may have been a time in history when if you had diabetes somebody asked you, do you have diabetes and they could have said to you, we cannot hire you. Certainly that is not the case today. Certainly you can have a disease as grave as that and fit more jobs. You are either in the process of being maintained, or we are coming close to finding a cure, or your disability is sporadic.

Likewise, the House Judiciary Committee Report and the Senate Report state that the impairment "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." House Report (III) at 28, Senate Report at 23.³¹

The agencies charged with interpreting and implementing the ADA appropriately incorporated this legislative history in directing that first prong coverage be decided without regard to mitigating measures. As this Court stated in *Bragdon*, with regard to interpretations by the Department of Justice, "[a]s the agency directed by Congress to issue implementing regulations, see U.S.C. § 12186(b) . . . and enforce Title III in court, the Department's views are entitled to deference." 118 S. Ct. at 2209. The same can be said of the EEOC, which has been charged with the obligation to issue regulations implementing Title I, 42 U.S.C. § 12116.

Both the DOJ and EEOC interpret the first prong of the definition as requiring a determination of substantial limitation to be made without regard to mitigating measures such as medicines, or assistance, or prosthetic devices. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999); 28 C.F.R. pt. 35, app. A § 35.104; pt. 36, app. B § 36.104 (1999). Given that the agency interpretations are not inconsistent with the plain meaning of the statute and are a reasonable interpretation, considering the uncertainties of mitigation, this Court should be guided by the admonition in *Chevron, U.S.A., Inc. v.*

³¹ Much has been made of the fact the Senate Report uses the example of individuals with controlled diabetes or epilepsy to illustrate third prong "regarded as" coverage. See discussion of "regarded as," *infra*. The Senate Report example only serves to underscore Congress' intent to cover such individuals. First, a person with diabetes or epilepsy that is controlled with medication or diet may not be substantially limited even without such measures. Second, and most importantly, the definition of disability is fluid, so that the example can be seen as either first prong if the effects of medication are not considered or third prong if they are. All of the contortions about the appropriate prong are unnecessary. What matters is that the individual is covered by the ADA, as Congress clearly intended.

National Resource Defense Council, Inc., 467 U.S. 837, 843-44 (1984):

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, explicitly or implicitly by Congress . . . [and] a court may not substitute its own construction . . . for a reasonable [agency] interpretation . . . " (quoting *Morton v. Ruiz*, 415 U.S. 119, 231 (1974)).

III. THE "REGARDED AS" PRONG OF THE DEFINITION OF DISABILITY IS INTENDED TO ADDRESS THE SUBSTANTIALLY LIMITING IMPACT OF NEGATIVE REACTIONS TO IMPAIRMENTS THAT ARE NOT OTHERWISE SUBSTANTIALLY LIMITING.

If this Court decides that substantial limitation must be decided after consideration of mitigating measures, then the plaintiffs should be covered under the "regarded as" prong of the definition of disability. 42 U.S.C. § 12102(2). The "regarded as" prong reflects the "civil rights" approach to disability discrimination, recognizing that problems faced by people with disabilities are often not inherent to the medical condition itself, but are rather the product of ignorance and prejudice.³² This was perfectly understood by this Court in *Arline*.³³

³² As Senator Weicker testified, "people with disabilities spend a lifetime overcoming not what God wrought, but what man imposed by custom and law." 136 Cong. Rec. S9684-03, *S9698 (1990). See, Jonathon C. Drimmer, *Cripples, Overcomers and Civil Rights: Tracing the Evolution of Legislation and Social Policy for People With Disabilities*, 40 U.C.L.A. L.Rev. 1341 (1993).

³³ Congress adopted the Court's interpretation of the definition of disability in the ADA. House Report (II) at 53; House Report (III) at 305.

To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." *Arline* at 279. . . .

. . . . By amending the definition . . . to include not only those who are actually physically impaired, but also those who are regarded as impaired, and who as a result are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. *Id.* at 284.

The entire purpose of the third prong is to provide a vehicle for examining exclusionary practices and to provide recognition that these exclusionary practices constitute substantial limitations in the lives of people with a wide variety of medical conditions. As the Supreme Court stated in *Arline*, "the basic purpose of [the statute] . . . is to ensure that [disabled] individuals are not denied jobs or other benefits because of the prejudicial attitudes or ignorance of others." *Id.* at 284.³⁴ Instead of giving credence to the breadth of the third prong, courts are creating burdens of proof for plaintiffs which are often illogical and insurmountable. Most troubling is the overuse of summary judgment to cut off ADA claims at the threshold coverage stage.³⁵

³⁴ In *Arline*, the Court quoted an *amicus* brief of the Epilepsy Foundation of America for the proposition that "[a] review of the history of epilepsy provides a salient example that fear rather than the handicap itself is the major impetus for discrimination against persons with handicaps." 480 U.S. at 285 n.13.

³⁵ See, Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 Harvard Civil Rights - Civil Liberties Law Review 99,

A. Congress and the Enforcing Agencies Adopted Long Standing Agency Interpretations of the "Regarded As" Prong of the Definition of Disability.

Congress patterned the ADA's "regarded as" prong on regulations implementing Section 504 of the Rehabilitation Act of 1973. *See Bragdon*, at 2202 (noting that Congress adopted previous regulatory interpretations of Section 504 when it enacted the ADA). As the House Judiciary Report explains,

The ADA uses the same "regarded as" test set forth in the regulations implementing Section 504 of the Rehabilitation Act. Those regulations provide:

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

House Report (III) at 29 citing 45 C.F.R. 84.3(j)(2)(iv).

Congress explicitly relied on the rationale articulated by this Court in *Arline* for an understanding of the meaning and scope of the "regarded as" prong.

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline*. [480 U.S. 273 (1987).] The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as

110 (1999) (courts have misused the summary judgment rules to the disservice of plaintiffs in ADA employment cases).

disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

Senate Report at 23; House Report (II) at 53; House Report (III) at 30.

The Section 504 regulation was adopted by both the EEOC and the Department of Justice in their ADA regulations. 29 C.F.R. § 1630.2; 28 C.F.R. § 35.104. The interpretive guidance to the EEOC and DOJ regulations tracks the committee reports. 29 C.F.R. pt. 1630; app. § 1630.2; 28 pt. 35, app. A § 35.104 pt. 36, app. B § 36.104, respectively.

Accordingly, the "regarded as" prong is (1) intended to cover individuals who do not satisfy the requirements of the first two prongs of the definition of disability under the ADA, and (2) is meant to acknowledge that the negative reactions of others can be just as "substantially limiting" as the impairment itself. In other words, the third prong is intended to address societal barriers to full participation based on physical or mental impairments.

Courts, however, have had trouble reconciling the label "disabled" with an individual who is functioning well enough to work and take part in community events. Yet, this is exactly what Congress intended. As Judge Posner explained,

Disability is broadly defined. It includes not only "a physical or mental impairment that substantially limits one or more of the major life activities of [the disabled] individual," but also the state of 'being regarded as having such an impairment.' The latter definition, although at first glance peculiar, actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied

employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995). It is necessary to provide an analytical framework for enforcing the "regarded as" prong which gives effect to Congress' purpose.

B. The Proper Analytical Framework.

It is useful to remember that the definition of disability is generic to the ADA, not attached to the specific provisions of any one Title. Therefore, it is necessary to develop an analytical framework that will work for all the Titles of the statute. It is helpful to first look at Title III, which covers public accommodations, because in the employment context the analysis often gets muddled and confused by issues related to qualifications for the job.

Under Title III, if a bakery refused service to an individual with facial scars, the bakery would be regarding the individual as disabled. It would not matter if there were other bakeries that would serve the person, or whether the baker thought that eating bakery goods was a major life activity. The prejudice of the baker is the limitation the third prong is meant to address. If the individual can establish that the bakery refused to serve the individual because of his facial scars, that would be sufficient to establish a *prima facie* case of discrimination under the third prong.³⁶ Cf. House Report (III) at 30. ("For example, severe burn victims often face discrimination in employment and participation in community

³⁶ The Department of Justice, in its section-by-section analysis to its regulations implementing Title III, adopts the view that a rejection based on disability by a public accommodation invokes the third prong of the definition of disability. The Department of Justice states:

which results in substantial limitation of major life activities.")

The question raised by *Sutton*, *Murphy*, and *Kirkingburg*, is how the third prong analysis should work in a Title I case. The legislative history indicates that when an applicant or employee is rejected from a job because of the individual's physical or mental impairment, there is at least a factual question as to whether the employer regarded the individual as being substantially limited in a major life activity, including working. The Senate Report gives as an example of individuals covered by the third prong "people who are rejected for a particular job for which they apply because of findings of a back abnormality on an x-ray."³⁷

The Judiciary Report confronts the issue directly, stating:

Thus, a person who is rejected from a job because of myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.³⁸

To underscore Congress' broad interpretation of coverage, the Judiciary Report states:

It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on a basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff qualifies for coverage under the "regarded as" test.³⁹

³⁷ Senate Report at 24.

³⁸ House Report (III) at 30.

³⁹ House Report (III) at 30-31.

Using this analysis, the EEOC cites concerns related to productivity, safety, insurance, liability, attendance, cost, accommodation, accessibility, worker's compensation costs or acceptance by co-workers and customers as examples of stereotypes, fears or misconceptions about disabilities.⁴⁰ The EEOC concludes that if an employer makes an adverse employment decision based on beliefs or fears that a person's perceived disability will cause problems in any of these areas, and the employer cannot show a legitimate nondiscriminatory reason for the action, the individual would be covered under the third prong of the definition.⁴¹

Too often, however, in the employment context, the lower courts are granting summary judgment to defendants, with the rationale that rejection from a "single job" is not enough to show that the employer regarded the rejected applicant or employee as substantially limited in the major life activity of working, or in any other major life activity.⁴² At

⁴⁰ 29 C.F.R. pt. 1630, app. §1630.2(1) (1999); EEOC *Technical Assistance Manual* at II-11.

⁴¹ *Id.*

⁴² Fortunately, some of the circuit courts are beginning to vacate such dismissals, recognizing that in most instances the issue of whether the employer regarded the plaintiff to have a disability is a question of fact. *See Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 819-20 (7th Cir. 1997) (leaving issue of whether defendant was regarded as having disability for lower court on remand); *Best v. Shell Oil*, 107 F.3d 544, 549 (7th Cir. 1997) ("[A] trier of fact could find that [defendant] perceived [plaintiff] as having a disability that prevented him from working"); *Harris v. H.W. Contracting Co.*, 102 F.3d 516, 524 (11th Cir. 1996) (finding question of fact still exists with respect to "regarded as" prong); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 955 (3d Cir. 1996) ("[I]t is clear that a reasonable fact-finder could infer that [defendant] perceived [plaintiff] to be disabled"); *Holihan v. Lucky Stores*, 87 F.3d 362, 366-67 (9th Cir. 1996) (holding that lower court erred in granting judgment as matter of law because the evidence could support finding that defendant regarded plaintiff as having disability); *Katz v. City Metal Co.*, 87 F.3d 26, 33-34 (1st Cir. 1996) (finding evidence created

least part of the problem appears to stem from a misapplication of the EEOC's regulations, which define substantially limited in the major life activity of working as

"significantly restricted in the ability to perform either a class of jobs, or a broad range of jobs in various classes as compared to the average person having comparable training, skill, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

Hence, in a case under the *first* prong of the definition of disability, the plaintiff must allege that his/her impairment actually restricts him/her from performing a "class of jobs."⁴³

genuine issue of material fact with respect to "regarded as" prong); *See also EEOC v. Joslyn Mfg. Co.*, No. 95C 4956, 1996 WL 400037, at *7 (N.D. Ill. July 15, 1996) ("[I]n order to survive summary judgment, the [plaintiff] only need raise a genuine issue of facts as to whether [the plaintiff's] perceived impairment substantially limited his ability to work, not actually prove as much.").

⁴³ The "single job" exception has also been interpreted too broadly by lower courts, to defeat first prong coverage. *See Robert L. Burgdorf, "Substantially Limited" Protection from Disability Discrimination: The Special Treatment, Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409 (1997).

The exclusion-from-one-job-is-not-enough formula has resulted in, or contributed to, the dismissal of ADA or section 504 of the Rehabilitation Act claims by plaintiffs with, among others, the following kinds of impairments: replacement of hips and shoulders (as a result of a vascular necrosis); diabetes; cancer; laryngectomy (removal of larynx); hemophilia; heart attack; absence of one eye; degenerative hip disease resulting in a limp; permanent severe limitations in use of the right arm and shoulder; various serious back injuries; depression and paranoia; a six-inch scar on the face resulting in supervisors calling the employee "scarface"; "bilateral carpal tunnel syndrome;" asthma; asbestosis; HIV infection; traumatic brain injury resulting in vision limitations, memory deficiencies, problems with verbal fluency, problems

However, under the third prong, a plaintiff is alleging that he/she *can* perform the class of jobs represented by the job in question. Therefore, the plaintiff will not be able to demonstrate, nor would he or she have any interest in demonstrating, that he or she is precluded from the class of jobs involved. In most cases, the only evidence which will be available to plaintiff is the rejection by the defendant. It is not the rejection per se which gives rise to the "regarded as" claim, but the natural and ordinary implication of such a rejection. Usually, if an employer rejects an individual from a job because of the individual's impairment, it means the employer thinks the individual's impairment precludes the individual from doing the types of tasks the job requires. Therefore, in most cases, a rejection based on a medical condition raises, at a minimum, a material issue of fact as to whether the employer "regarded" the individual as "disabled" within the meaning of the ADA.

Summary judgment on the definition issue is inappropriate, except in cases where there is no conceivable set of facts from which a trier of fact could conclude that plaintiff was "regarded as" substantially limited in working or in any other major life activity. Self serving statements by a defendant that it did not regard the plaintiff as so limited cannot be the basis of summary judgment when the natural and predictable implication of the adverse treatment is otherwise.

abstracting and motor deficits; and stroke resulting in the loss of use of the left hand, arm and leg. (footnotes omitted)

For case cites see *id.* at 539-541 nn.643-661.

C. Analytical Problems with the Lower Court Decisions, as Illustrated by the Tenth Circuit Opinions.

The mistakes of the lower courts are illustrated by the Tenth Circuit opinion in *Sutton*,⁴⁴ where the court:

1. Required, in essence, that plaintiffs be actually substantially limited (1st prong) in order to establish a "regarded as" case; and
2. Required that the plaintiffs demonstrate that the employer regarded them to be disqualified from similar jobs by other employers.

Both of these requirements, often combined, constitute insurmountable obstacles for plaintiffs.⁴⁵ Since an employer is only concerned with the particular job it is offering, it is not likely to be thinking about other jobs the impaired individual could or could not obtain and certainly is not thinking about how the plaintiff's impairment affects other activities besides working. The only way to give meaning to the "regarded as" prong is to interpret the rejection from the job in question to signify the employer's view of the plaintiff's ability to perform the class of jobs to which the job in question belongs.

Yet, employers are being allowed to defend suits under the ADA by proving that other employers do not utilize the same discriminatory criteria as that employed by the defendant and that, therefore, the discriminatory criteria does not constitute a substantial barrier to employment.⁴⁶ In other

⁴⁴ The *Sutton* decision provides a more thorough analysis of the "regarded as" prong than *Murphy*.

⁴⁵ See e.g., *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (rejecting plaintiff's "regarded as" claim because he was not substantially limited in major life activity).

⁴⁶ See *Burgdorf* at 441, 456, n.234; see e.g., *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996). (In a case involving rejection as a fire fighter because of hemophilia, where the court refused to consider the policy of the city to require all EMT and paramedic positions to meet firefighting

words, the more arbitrary and prejudicial the physical or mental criteria, the more likely the employer will be able to escape review under the ADA.⁴⁷ This argument would be untenable in other areas of civil rights law, where proof of other employers' nondiscriminatory job criteria would be used as evidence of the defendant's discrimination.

The Tenth Circuit opinion in *Sutton* illustrates how both the infusing of first prong analysis in "regarded as" cases and requiring a plaintiff to demonstrate the employer's perception beyond the natural implications of the rejection itself undermines the "regarded as" prong. In determining whether United "regarded" plaintiffs as unable to do a class of jobs, the court immediately shifted its inquiry to the first prong analysis of whether plaintiffs' impairment actually substantially limited their employment in a "class of jobs". *Sutton* at 903-904. The Court then concluded that if the plaintiffs are not substantially limited in working in actuality, they also cannot be found to have been regarded as substantially limited. This judicial construction effectively repeals the third prong of the definition.

The court also improperly applies the "single job" exception in the EEOC regulations defining "substantially limited in working" to the "regarded as" analysis. Although the Tenth Circuit accepts plaintiffs' allegations that United rejected

standards in consideration of whether plaintiff was excluded from a "class of jobs" because there was no proof that other employers did the same thing.)

⁴⁷ The case which gave rise to the "class of jobs" analysis recognized that in "evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process," *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1100 (D. Hawaii 1980). The court in *E.E. Black* underscored the importance of a presumption of common usage of the discriminatory criteria. *Id.* Otherwise, according to the court, an employer using the "aberrational type of job qualification . . . would be rewarded if his reason for rejecting the applicant were ridiculous enough." *Id.*

them from all pilot jobs at United the court concludes that this rejection is not sufficient to demonstrate rejection from a "class of jobs," which would include not only global airlines, such as United, but all other types of carriers as well (national, commuter, regional, cargo/courier airlines). However, the court gives absolutely no indication as to how plaintiffs are to demonstrate whether or not United regarded them as able or unable to work for the other types of airlines. The court simply states that it cannot adopt a "reasoning [that] would imply that anyone who failed to obtain a single job because of a single requirement of employment could become a "disabled individual . . . This reading would stand the Act on its head." *Sutton* at 905.

As the Sixth Circuit stated in *Taylor v. United States Postal Service*, 946 F.2d 1214, 1218 (6th Cir. 1991),

. . . a per se rule that never permitted an unsuccessful job applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to physical impairment would likewise stand the Act on its head. How else would a person who, for example, had a cosmetic disfigurement ever prove that he was handicapped under the Act except by pointing to the fact that an employer did not hire him for that reason?

In most cases, the plaintiff will only know that the employer rejected him or her because of an impairment. Absent contrary evidence, the rejection from the job in question must be viewed as a perception that the plaintiff is unable to perform the class of jobs of which the particular job is a part. For example, if an employer rejects an applicant for a teaching job because of an impairment, the applicant is regarded as unable to teach. Plaintiffs' allegation that there is nothing unique about the United pilot jobs should suffice to establish that United regarded plaintiffs (or all those with

uncorrected vision of 20/100 or worse) as unable to perform the class of jobs of piloting.⁴⁸

Moreover, since plaintiffs were rejected because of their *uncorrected* vision, United cannot claim that it did not regard them as substantially limited in seeing because they can wear glasses. It would be unfair to look at the "regarded as" prong with mitigating measures that the defendant refused to consider in the rejection.

The Tenth Circuit's results-oriented approach can perhaps be explained by the courts' fundamental misunderstanding of the significance of finding that plaintiffs were "regarded as" disabled under the ADA. Immediately after rejecting plaintiffs' "regarded as" claim, the court cited *Kelly v. Drexel University*, 94 F.3d 102, 109 (3d Cir. 1996) for the proposition that accepting plaintiffs' claim would mean that "anyone could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual. . . ."

The fundamental misunderstanding revealed by this quote is the assumption that establishing *coverage* is sufficient to establish a *prima facie* case. As stated earlier, the coverage question is just the first prerequisite of a *prima facie* ADA case.⁴⁹ The plaintiff must also show that he or she is qualified to perform the essential functions of the job and that

⁴⁸ The Tenth Circuit references the EEOC's example that "an individual who cannot be a commercial pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. §1630, app. §1630.2(j) para. 12. This example is used to explain whether, under the first prong of the definition of disability, an individual is actually substantially limited in working. Again, as explained above, in a "regarded as" case the allegation that United rejected plaintiffs from all pilot positions with United must be interpreted to at least raise a factual issue that United regarded plaintiffs as unqualified for pilot jobs in general.

⁴⁹ See *infra*.

the rejection was based on disability. As the Supreme Court warned in *Arline*, 480 U.S. at 285, by excluding an impaired individual from coverage, the individual loses the opportunity to have the condition evaluated in light of medical evidence, thus making him or her "vulnerable to discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent."

Another insight into the Tenth Circuit's restrictive interpretation of coverage is revealed in the Court's statement that "[w]e refuse to construe the . . . The Act as a handout to those who are in fact capable of working in substantially similar jobs." *Sutton* at 906. Citing *Hileman v. City of Dallas*, 115 F.3d 352, 354 (5th Cir. 1997). Coverage under the ADA is not a hand-out. The fact that an individual *might* be able to find work elsewhere should not shield an employer from having its exclusionary medical criteria evaluated in light of objective medical evidence. As was emphasized time and time again in the legislative history of the ADA, "[b]y including the phrase 'qualified individual with a disability' the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. . . ." Senate Report at 26. "An employer may still devise physical and other job criteria and tests for a job so long as the criteria and tests are job related and consistent with business necessity." *Id.* at 27.

ADA plaintiffs want to work; they want to be tax-paying, contributing members of our society. Courts are accustomed to the term "disability" meaning "inability" in cases for benefits and tort awards. The ADA provides a new framework for the term disability. The third prong of the definition, in particular, is causing confusion because it uses the term "disabled" to describe people whose biggest limitation is the attitudes of others. *Amici*, current and former members of Congress, look to this Court to set forth the proper analytical framework for the lower courts, to give effect to Congressional intent to eliminate attitudinal barriers which limit the

opportunities of millions of Americans with a wide range of medical conditions.

CONCLUSION

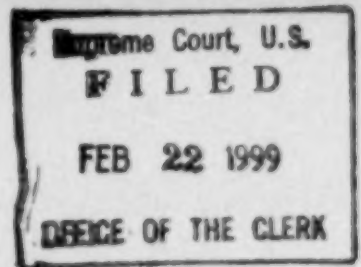
For the foregoing reasons, the judgments of the Court of Appeals for the Tenth Circuit should be reversed and the judgment of the Court of Appeals for the Ninth Circuit affirmed.

Dated: February 19, 1999

Respectfully submitted,

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(9)
No. 98-591



IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ALBERTSONS, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**BRIEF AMICUS CURIAE OF
UNITED PARCEL SERVICE OF AMERICA, INC.,
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Amicus curiae United Parcel Service of America, Inc., will address the following question:

Whether the court of appeals erred in holding that monocular vision constitutes a "disability" under the Americans with Disabilities Act ("ADA"). Fairly encompassed within that question are two subsidiary issues, namely, (a) whether the court of appeals erred in failing to give proper weight to the ability of an impaired individual to compensate for or mitigate the effects of his or her impairment, and (b) whether the court of appeals erred in holding that respondent was "regarded as" disabled within the meaning of the ADA.

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**BRIEF *AMICUS CURIAE* OF
UNITED PARCEL SERVICE OF AMERICA, INC.,
IN SUPPORT OF PETITIONER**

United Parcel Service of America, Inc. ("UPS") respectfully submits this *amicus curiae* brief in support of petitioner on the question whether monocular vision constitutes a "disability" under the Americans with Disabilities Act ("ADA").¹

INTEREST OF *AMICUS CURIAE*

UPS is one of the largest employers in the United States, with nearly 300,000 employees in all 50 states and every territory. Because of the size and scope of its workforce, UPS has faced the difficult issue of application of the Americans with Disabilities Act in almost every employment context. That difficulty has been compounded by the unduly expansive interpretations of the ADA adopted by some lower courts, which if not corrected will result in extending the coverage of the ADA to far more Americans than can be justified by a common sense reading of the statutory text.

Because it operates in every jurisdiction and venue in this Nation, UPS is vitally concerned with the development of this new federal statute and with the adoption of uniform and statutorily permissible approaches to its application. UPS often speaks out on issues of concern to American employers before Congress, regulatory

¹ Pursuant to this Court's Rule 37.6, UPS states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than UPS or its counsel made a monetary contribution to the preparation or submission of this brief.

agencies, and the federal courts, and is well-situated to present the perspective of large American employers regarding employment law issues.

UPS also has a specific interest in the interpretation of the ADA announced by the Ninth Circuit in this case. UPS is the defendant in a nationwide lawsuit brought by the Equal Employment Opportunity Commission ("EEOC") on the issue of monocular vision under the ADA, *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.). In addition, UPS is the respondent in another case currently pending before this Court, *Murphy v. United Parcel Service*, No. 97-1992 (*cert. granted* Jan. 8, 1999), which presents related questions concerning the scope and meaning of the ADA's definition of "disability." The resolution of these questions will have a major impact on the ultimate scope of the obligations and burdens imposed by the ADA on UPS and other American businesses.

For all these reasons, UPS has a substantial interest in the questions presented in this case. Accordingly, UPS respectfully submits this *amicus curiae* brief to demonstrate the erroneous nature of the decision below, and to provide the Court with a more complete understanding of the nature of monocular vision and its minimal impact on the lives of monocular individuals. Both petitioner and respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

I. The court of appeals erroneously adopted a definition of disability under the ADA that sharply conflicts with the plain language of the statute. The court essentially dispensed with the statutory requirement that an impairment must be "substantially limit[ing]" before it will constitute a disability, and instead held that an impairment is disabling whenever it causes the impaired individual to perform a major life activity in a "different manner" than unimpaired individuals. The court's "different manner" test is inconsistent with, and there-

fore precluded by, the statutory text.

The court of appeals also erred in purporting to make a *per se* determination that monocular vision is a disability under the ADA and in failing to require respondent to meet his burden of identifying individualized proof that his monocular vision substantially limits his major life activity of seeing. The court's *per se* approach to this issue is inconsistent with the ADA's definition of disability, which expressly contemplates an individualized determination: "[D]isability" means *with respect to an individual . . . a physical or mental impairment that substantially limits . . . the major life activities of such individual.*" 42 U.S.C. § 12102(2)(A) (emphasis added).

The court of appeals compounded these errors by predicated its finding of disability in part on the fact that respondent has developed the "subconscious" ability to compensate for and mitigate the effects of his impairment. Far from justifying a finding of disability, the ability to minimize the adverse effects of an impairment instead demonstrates that the impairment is *not* disabling, because the disability inquiry requires a real-world examination of the actual present effect of the impairment. Accordingly, the court of appeals' interpretation of the ADA's definition of "disability" is incorrect, and should be rejected.

II. Under a proper understanding of the definition of "disability," it is clear that respondent (like other individuals with monocular vision) is not disabled. The record in this case demonstrates that respondent's monocular vision has not had a substantial impact on his ability to see, and that respondent has developed "subconscious" and permanent internal mechanisms for coping with the effects of his impairment. The scientific and medical literature regarding monocular vision indicates that the remarkable adaptability of the human mind and body enables monocular individuals to conduct their lives in ways that are, for virtually all practical purposes, indistinguishable from those of the average person with bin-

ocular vision. Accordingly, the conclusion is inescapable that respondent is not "substantially limit[ed]" in the major life activity of seeing.

III. The court of appeals also erred in concluding that respondent could be found to be disabled under 42 U.S.C. § 12102(2)(C) on the ground that he was "regarded as" disabled. That holding appears to be predicated on the erroneous assumption that monocular-ity is a disability *per se*, and accordingly cannot withstand scrutiny. In any event, respondent has not met his burden of proving that his monocular vision substantially limits the major life activities of seeing or working, and there is no evidence that Albertsons had a different perception. Albertsons' mere awareness of respondent's impairment is not sufficient to show that Albertsons "regarded" respondent as disabled.

ARGUMENT

I. The Plain Language Of The Act Compels Rejection Of The Reasoning Utilized By The Court Of Appeals In Concluding That Monocular Vision Is A "Disability"

A. The Court Of Appeals Erred In Holding That Individuals Who Perform Activities In A "Different Manner" Are Disabled

Under the ADA, an individual is disabled if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). In keeping with the statutory text, this Court has held that an impaired individual may properly be characterized as disabled if "*significant limitations result from the impairment.*" *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998) (emphasis added).

Despite the statute's explicit command, the court of appeals essentially dispensed with the requirement that

an impairment must be "substantially limit[ing]" in order to constitute a disability. Instead, the court held, respondent's monocular vision is a disability merely because it causes him to see in a different *manner* than other individuals: "Although [respondent's] brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see." Pet. App. 14a (emphasis in original); *see also id.* at 14a-15a ("[Respondent] sees using only one eye; most people see using two. *Accordingly*, . . . he is disabled.") (emphasis added); *id.* at 15a n.4 (test "is whether . . . the individual is required to perform a major life activity in a *different manner* from other persons") (emphasis added).

The court of appeals clearly erred in resting its disability holding on the fact that respondent sees in a different *manner* than other individuals. The statutory text expressly limits the category of "disabilities" to those impairments that "substantially limit[]" one or more major life activities of the impaired individual. 42 U.S.C. § 12102(2)(A). Plainly, not every "difference" amounts to a substantial limitation. Indeed, many "differences" in the manner of performing particular activities are not limiting at all, and others are not *substantially* limiting because they do not restrict the affected individual's ability to perform the activity in any essential or important way. An individual who has only one kidney might be required to observe certain dietary restrictions and thus change her manner of "eating," but she would not be substantially limited in any meaningful sense. A person with a mild but permanent leg injury might slightly favor his right foot when he walks, without suffering any meaningful diminution in his ability to walk or perform other activities. These alterations may be imperceptible to others and of little or no consequence to the individuals themselves. Yet under the court of appeals' reasoning, these individuals would be "disabled" because their impairments cause them to per-

form major life activities in a "different manner from other persons." Pet. App. 15a n.4.

The court of appeals suggested that its "different manner" test was compelled by the EEOC's regulations interpreting the ADA, which define "substantially limits" to mean "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to . . . the average person in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). Focusing exclusively on the regulatory reference to the "manner" of performing a major life activity, the court concluded that any variation in the *manner* by which an impaired individual performs a major life activity necessarily satisfies the regulatory definition. Pet. App. 14a-15a.

Contrary to the court of appeals' reasoning, the EEOC regulations do not justify the court's adoption of a "different manner" test. In the first place, the regulations are simply beside the point, because the text of the ADA unambiguously precludes the court's interpretation of the statute. No mere administrative interpretation can override a clear statutory command. See, e.g., *Dole v. United Steelworkers of America*, 494 U.S. 26, 42 (1990) (where "the statute, as a whole, clearly expresses Congress' intention, we decline to defer to [the agency's] interpretation"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

In any event, the EEOC regulations do not justify or compel the court of appeals' "different manner" test. In placing sole emphasis on the word "*manner*" (Pet. App. 14a), the court mistakenly overlooked the regulatory requirement that the individual's manner of performing the relevant activity must be "*significantly restricted*" before a finding of disability can be made. 29 C.F.R. § 1630.2(j)(1)(ii) (emphasis added). As a result, the court of appeals' disability determination draws no sup-

port from, and in fact conflicts with, the regulations on which the court relied.

Not surprisingly, the "different manner" test is inconsistent with the analysis employed by the overwhelming majority of lower courts that have considered the ADA's definition of disability.² This Court should reach the same conclusion, and hold that the ADA precludes the unique "different manner" test adopted by the court of appeals.

² See, e.g., *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15-16 (1st Cir. 1997); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643-44 (2d Cir. 1998); *Olson v. General Elec. Astro-space*, 101 F.3d 947, 952 (3d Cir. 1996); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997); *Deas v. River West, L.P.*, 152 F.3d 471, 479-80 (5th Cir. 1998), *pet. for cert. filed*, No. 98-916 (U.S. Dec. 2, 1998); *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 371-72 (6th Cir. 1997); *Duncan v. State of Wisconsin Dep't of Health & Family Servs.*, ___ F.3d ___, 1999 WL 44845, at *5 (7th Cir. Feb. 3, 1999); *Perkins v. St. Louis County Water Co.*, 160 F.3d 446, 448 (8th Cir. 1998); *Pack v. Kmart Corp.*, ___ F.3d ___, 1999 WL 51882, at *4 (10th Cir. Feb. 4, 1999); *Standard v. A.B.E.L. Servs., Inc.*, 165 F.3d 1318, 1327 (11th Cir. 1998). But see *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998). A number of courts have erroneously held that the disability determination is to be made without regard to any compensating or mitigating factors that may minimize the impairment's impact on the affected individual, but even these courts do not follow the Ninth Circuit's "different manner" test. See *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 865-66 (1st Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629 (7th Cir. 1998); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 521-23 (11th Cir. 1996); see also *infra* Part I.C.

B. The Court Of Appeals Erred In Failing To Require Respondent To Make An Individualized Showing That Monocularity Substantially Limits His Ability To See

Without making any effort to analyze the actual effect of monocular vision on respondent, the court of appeals held that monocularity constitutes a disability *per se*. Pet. App. 13a-15a. According to the court, "it is clear that a person who is blind or practically blind in one eye is disabled within the meaning of the Act" (*id.* at 13a), regardless of that individual's actual ability to perform vision-related activities. The court of appeals erred in addressing the question of monocularity in this *per se* manner, and in failing to require respondent to meet his burden of identifying individualized proof that his monocularity substantially limits his performance of the major life activity of seeing.

Under the ADA, plaintiffs bear the burden of proving that they are disabled.³ In order to meet that burden, respondent was required to make an individualized showing that his impairment rises to the level of a disability: "[D]isability' means, with respect to an individual . . . a physical or mental impairment that substantially limits . . . the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (emphasis added). The statutory text precludes the *per se* approach followed by the court of appeals in deciding this issue, because it requires a

³ See, e.g., *Katz v. City Metal Co.*, 87 F.3d 26, 30 (1st Cir. 1996); *Wernick v. Federal Res. Bank of N.Y.*, 91 F.3d 379, 383 (2d Cir. 1996); *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 763 (5th Cir. 1996); *Ross v. Indiana State Teacher's Ass'n Ins. Trust*, 159 F.3d 1001, 1013 (7th Cir. 1998).

showing that the impairment has a substantial impact on the plaintiff in particular.⁴

Accordingly, instead of holding that monocularity constitutes a disability *per se*, the court of appeals should have affirmed the dismissal of respondent's claims unless respondent could identify sufficient evidence to prove that monocularity substantially limits his major life activities. Other federal courts have followed this course, looking to the plaintiff's performance of daily activities to determine whether he or she is substantially limited in the major life activity of seeing. See, e.g., *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) ("although his peripheral vision is limited by his partial blindness, [plaintiff] is able to perform normal daily activities" requiring visual acuity, including driving cars and motorcycles, and thus he is not "disabled"); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (plaintiff's "strabismus" (cross-eyed condition) "had never had any effect whatsoever on any of his activities, including his past work history and ability to carry out" most of his duties at the post office; thus, he was not "handicapped").⁵ The court of appeals erred in failing to follow that same approach here.

⁴ To be sure, some impairments are so severe—or so inconsequential—that this individualized determination can be made in summary fashion. But the court of appeals erred in assuming that monocularity falls into the category of clearly disabling impairments. See *infra* Part II.

⁵ See also, e.g., *Hoppes v. Commonwealth of Pa.*, No. Civ.A. 1:CV-97-1959, 1998 WL 9654107, at *4 (M.D. Pa. Dec. 15, 1998); *Bancale v. Cox Lumber Co.*, No. 97-113-CIV-FTM-25D, 1998 WL 469863 at *4 (M.D. Fla. May 18, 1998); *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1080-81 (E.D. Okla. 1997); *Overturf v. Penn Ventilator Co.*, 929 F. Supp. 895, 898 (E.D. Pa. 1996); *Sweet v. Electronic Data Sys.*, No. 95 Civ. 3987

C. The Court Of Appeals Failed To Give Proper Weight To Respondent's Ability To Compensate For His Impairment

The court of appeals compounded its errors by failing to give proper weight to respondent's ability to compensate for the effects of his impairment. Indeed, the court appears to have predicated its "different manner" holding at least in part on its determination that respondent's "brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability." Pet. App. 14a. According to the court of appeals, the very existence of these "subconscious mechanisms" supports a finding that he is disabled, because they confirm that "the *manner* in which he sees differs significantly from the *manner* in which most people see." *Id.* (emphasis in original). Under this view, the fact that an impaired individual is able (through use of internal adjustments or other mitigating measures) to perform at essentially the same ability level as unimpaired persons leads to the counterintuitive conclusion that the individual *is* disabled.

The court of appeals' counterintuitive treatment of mitigating factors is inconsistent with the text and structure of the ADA. Far from justifying a finding of disability, an impaired individual's ability to compensate for or mitigate the effects of the impairment is instead an important consideration that weighs heavily against a finding of disability.

The definition of disability is phrased in the present tense—*i.e.*, an "impairment that substantially limits," 42

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(MBM), 1996 WL 204471, at *5 (S.D.N.Y. Apr. 26, 1996); *Walker v. Aberdeen-Monroe County Hosp.*, 838 F. Supp. 285, 288 (N.D. Miss. 1993).

U.S.C. § 12102(2)(A)—thereby demonstrating that the statutorily mandated inquiry is not a hypothetical examination of whether the individual *would* be disabled in the absence of mitigating measures. Instead, the statute expressly looks to the present, and inquires whether the individual is *in fact* "substantially limit[ed]" in performing his or her major life activities. See *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). The inquiry into the *present* impact of an impairment necessarily requires consideration of present reality, including the real-world impact of any compensating or mitigating measures. For that reason, and for all the reasons set forth in the Brief of *Amici Curiae* American Trucking Associations, Inc., *et al.*, the court of appeals erred in failing to treat respondent's ability to compensate for his impairment as further proof that he is not disabled.

II. Respondent's Monocular Vision Does Not "Substantially Limit" His Major Life Activity Of Seeing

Respondent clearly failed to meet his burden of making an individualized showing that monocular vision "substantially limits" his major life activity of seeing. The record evidence indicates that respondent's monocular vision does not substantially restrict his ability to engage in sight-related activities. That evidence is consistent with the available scientific and medical evidence, and with the fact that most individuals with monocular vision report that they are not substantially limited in their major life activities as a result of their vision impairment. Under a proper understanding of the definition of "disability," therefore, respondent is not disabled.

A. According To His Own Statements And Other Evidence, Respondent Is Not Disabled

Respondent's own statements demonstrate that despite his monocular vision, respondent is not substantially limited in the major life activity of seeing. When asked on his job application whether he had any physical limitations, for example, respondent answered, "None." Ct. App. Supplemental Excerpt of Record at 29. Similarly, respondent testified that his monocular vision has never interfered with his ability to perform any jobs:

Q: Other than your experience at Albertson's, has your eye situation ever interfered with your doing anything else in terms of work that you wanted to do?

A: Not that I recall.

Joint Appendix ("J.A.") 275. Indeed, respondent has held jobs that involved driving, and has performed them without incident. Pet. App. 9a; *see* J.A. 295-96.

Thus, the evidence indicates that respondent has learned to function normally despite having the complete use of only one eye. As the court of appeals observed, "his brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his" condition. Pet. App. 14a. In fact, respondent's adaptation is so complete that "it was hard for [him] to believe what they were talking about" when his physician explained that there was "[s]omething[] wrong with [his] vision." J.A. 285. Thus, it is not surprising that respondent's monocular vision has not interfered with his ability to complete a college degree and work in a wide range of jobs, including serving as a county power equipment supervisor, building and operating a laundromat, driving trucks, operating a service station, running a garbage hauling business, and repairing jet aircraft, trucks, and automobiles. *See* J.A. 137-38, 272-73, 282, 286-88; *see also* Ct. App. Excerpt of

Record 59, 63-67.

To classify as "disabled" someone as able as respondent merely because he makes do with one eye is to ignore the plain language of the ADA, which requires that an individual must be *substantially* limited in a major life activity before being classified as disabled. It is also to adopt one of the very "stereotypic[al] assumptions not truly indicative of the individual ability of such individuals" that the ADA was designed to stamp out (42 U.S.C. § 12101(a)(7)), and to convert the ADA into one of the very "overprotective rules and policies" that the statute forbids. 42 U.S.C. §§ 12101(a)(5), 12112(a), (b)(1). The court of appeals erred in employing a generalized and stereotypical view of the impact of monocular vision rather than engaging in an individualized assessment of the sufficiency of respondent's evidence to prove that he is disabled—an assessment that would inevitably have led to a determination that he did not meet that burden.

B. Monocular Vision Is Not A Disabling Condition

The medical and scientific literature regarding monocular vision confirms that, contrary to the court of appeals' stereotypical assumption, monocular vision is not a disabling impairment. Individuals with monocular vision "lead quite normal, healthy and productive lives." Cecilia Y. Perez, *The Visual Ramifications Of Losing An Eye (Part II)*, 9 J. VISION REHAB. 12, 17 (1995). In fact, the vast majority of individuals with sight in one eye neither perceive themselves as disabled nor are disabled, and, although "the ophthalmic literature rarely addresses the impact of monocular vision on individuals' life activities" (John V. Linberg *et al.*, *Recovery After Loss of an Eye*, 4 OPTHALMIC PLASTIC & RECONSTRUCTIVE SURGERY 135, 136 (1998)), the available reports—both scientific and anecdotal—consistently indicate that monocular individuals can engage freely and without significant limitation in all of the major life activities that

binocular individuals enjoy, including activities involving eyesight.

In a recent survey conducted under the auspices of the West Virginia University Department of Ophthalmology, for example, "the great majority of monocular adults had no subjective perception of disability in everyday tasks, and reported that the time required for adjustment [to monocular vision] was short." Linberg *et al.*, *supra*, at 137. After one month, half of the individuals participating in the study had adjusted to their impairment and returned to their normal activities, including "driving," "work," "recreation," "home activities," and "walking." *Id.* at 135-37. After one year, 93 percent "had adjusted to the loss of their eye . . . with respect to" those activities. *Id.* For 80 percent of the monocular individuals studied, their loss of an eye had "no effect" on their normal activities after the adjustment period had ended, and for approximately two-thirds of those studied their impairment had not "changed [their] life in any permanent way." *Id.* at 136, 137. The study concluded by rejecting the suggestion that "loss of an eye creates a significant handicap." *Id.* at 137.⁶

⁶ The deposition testimony of plaintiffs with monocular vision in *EEOC v. United Parcel Service, Inc.*, No. C 97-961-FMS (N.D. Cal.), consistently supports these findings. For example, when asked whether there is "any activity that you feel you won't do or can't do because of your impaired vision," plaintiff James Akins answered, "No." Akins Depo. at 11. When asked, "How, if at all, your vision impairment affect[s] your day-to-day life," plaintiff Shawn Hogya replied, "Day to day it doesn't affect me I have learned to adapt to it over the years." Hogya Depo. at 9. When asked whether "your vision impairment substantially limits your ability to see," plaintiff Stephen Ligas answered, "No," and when asked whether "there [is] any activity that you don't do or won't do because of your vision,"

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In the world of sports, in all age groups and even at the highest levels of competition, monocular vision is not rare. In the National Football League, for example, recent top draft picks such as Cedric Jones from the University of Oklahoma and Jermaine Mayberry of Texas A&M were top college performers despite their monocular vision, and retired monocular players include Kansas City Chiefs tight end Fred Arbanas and Pro Bowl receiver Wesley Walker of the New York Jets. See Jerry Wizig, *Day Turns Out As Well As Jones Could Envision*, HOUSTON CHRON., Apr. 21, 1996, at 14; see also Dick Weiss, *Gator More Than Meets The Eye*, N.Y. DAILY NEWS, Dec. 24, 1998, at 74 (Univ. of Florida basketball star Eddie Shannon); Jerry Sullivan, *Lady Bengal's Vision To Excel, Help Others Puts Her Life In Focus*, BUFFALO NEWS, Dec. 10, 1998, at E1 (high school basketball star Renee Witt). The experiences of these individuals are supported by scientific study of the visual coordination required for athletics. A 1993 study at York University in Ontario, Canada, demonstrated that individuals with monocular vision "are able . . . to discriminate differences in the direction of motion in depth," and that as a result, monocular individuals, like other "sports players of even moderate accomplishment[,] can judge precisely the direction of motion in depth . . . when catching or hitting a ball." D. Regan and Suneeti Kaushal, *Monocular Discrimination in the Direction of Motion in Depth*, 34 VISION RES. 163, 173, 175-76 (1994).

In some contexts, in fact, individuals "are more accurate with monocular than with binocular vision." Wil-

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he again answered, "No," and finally, when asked whether "you feel you can do everything as well as people with two unimpaired eyes," he replied, "Yes." Ligas Depo. at 8.

liam Prinzmetal and Laurie Gettleman, *Vertical-horizontal illusion: One eye is better than two*, 53 PERCEPTION & PSYCHOPHYSICS 81, 81 (1993). For example, individuals with binocular vision often mistakenly judge a vertical line to be longer than a horizontal line of the same length. In a study sponsored by the National Institute of Mental Health, researchers determined that individuals with one eye tend to make more accurate visual judgments on such tests. *Id.* at 87. Scientific consensus holds that this is at least in part a product of the differences between the elliptical field of view created by the overlapping fields of view in binocular vision and the more nearly circular field of view in monocular vision. *Id.*

In short, monocular vision does not result in a substantial limitation on the major life activity of seeing. Contrary to the reasoning of the court of appeals, therefore, monocular vision does not rise to the level of a disability.

C. Scientific Studies Show That Monocular Vision Raises Serious Safety Concerns In The Context Of Commercial Driving

The fact that monocular individuals are not substantially limited in the major life activity of seeing does not mean, however, that such individuals are fully qualified to perform all sight-related tasks at the same level as binocular individuals. While monocular individuals are fully capable of leading normal lives and may be able to perform the full range of passenger-car driving-related tasks, the consensus in the scientific and professional community—a consensus accepted and implemented by the U.S. Department of Transportation ("DOT") (see 49 C.F.R. § 391.41)—is that serious safety concerns are

presented by the prospect of monocular individuals serving as drivers of commercial vehicles.⁷

For example, the leading study prepared for the DOT on this subject concludes that "the wording of a standard that *de facto* excludes monocular drivers . . . is supported by the ratings." Lawrence E. Decina *et al.*, *Visual Disorders and Commercial Drivers* 1, 30 (National Tech. Info. Serv. ("NTIS") Nov. 1991). The same report recommends that the DOT retain its ban on monocular drivers in buses and in large trucks traveling in interstate commerce (*id.* at 37), a recommendation that the DOT has followed. See 49 C.F.R. § 391.41.

Similarly, the largest regional study of truck driver safety concludes that truck drivers with visual impairments, including monocular vision, are substantially more likely to be involved in accidents and be convicted of traffic violations than unimpaired drivers. See Patrice N. Rogers *et al.*, *supra* note 7, at iii (visually impaired drivers in state-licensed commercial vehicles had a 65 percent higher accident rate than non-impaired drivers, and a 58 percent higher rate of convictions for traffic violations). Numerous other studies are to the same effect. See, e.g., Patrice N. Rogers and Mary K. Janke, *Performance Of Visually Impaired Heavy Vehicle Op-*

⁷ Of course, the safety concerns raised by monocular vision in commercial drivers varies depending on the extent of the impairment. See, e.g., Patrice N. Rogers *et al.*, ACCIDENT AND CONVICTION RATES OF VISUALLY-IMPAIRED HEAVY-VEHICLE OPERATORS ii-iv (Cal. DMV, Rept. No. RSS-87-111, Jan. 1987). There is no scientific agreement on the extent of vision impairment in the worse eye that is required to render an individual "monocular." Thus, depending on the definition employed, there may be some "monocular" individuals who can drive commercial vehicles within acceptable safety limits.

erators, 23 J. SAFETY RESEARCH 159, 159-70 (1992); Robert L. Henderson and Albert Burg, *Vision And Audition In Driving* (NTIS Nov. 1974); Robert L. Henderson and Albert Burg, *The Role Of Vision And Audition In Truck And Bus Driving* (NTIS Dec. 1973).

A number of factors combine to create these serious safety concerns regarding monocular individuals of commercial vehicles. First, most commercial vehicles are configured differently than passenger cars. They typically are larger and heavier, making them more difficult to control and stop and reducing the time available to react to perceived dangers. Commercial vehicles also typically have restricted lines of sight and generally have no rear-view mirrors, instead relying on side mirrors which require the driver to turn his or her head to obtain complete driving information. The combination of these factors can render the monocular commercial driver "essentially without forward visual acuity because there is no nasal retina of the [other] eye to register images which are forward while the head and [other] eye are turned." Arthur H. Keeney, *The Monocular Quandary* 1, 7 (1994), cited at 59 Fed. Reg. 59,386, 59,388 (1994).

In addition, commercial drivers (unlike passenger car drivers), often have no discretion regarding whether they must drive in darkness or bad weather conditions—and those conditions pose particular problems for monocular drivers. John R. Griffin *et al.*, BINOCULAR ANOMALIES: DIAGNOSIS AND VISION THERAPY 4 (3d ed. 1995). Furthermore, depth perception—and its essential correlate, the ability to estimate when a vehicle will collide with an approaching object—are less accurate among monocular drivers, especially at close range. R. Gray and D. Regan, *Accuracy of Estimating Time to Collision using Binocular and Monocular Information*, 38 VISION RES. 499, 507-09 (1998); accord Viola Cavallo and Michel Laurent, *Visual information and skill level in time-to-collision estimation*, 17 PERCEPTION 623, 629 (1988).

While these differences between monocular and binocular drivers may be insignificant in the context of private passenger vehicles, for the monocular commercial driver they "are compounded by heavy truck weights, less maneuverability, prolonged stopping distance and the need to monitor road conditions and other vehicles more minutely." Keeney, *supra* at 5-6. Moreover, the stakes are higher with larger vehicles. "Though crashes are statistically *rare* events in the multi-million population of commercial drivers, these rare events are often tragedies—and even more unfortunately—result in death or injury to one or more occupants in a passenger vehicles involved in such a crash." *Id.* at 19; Decina, *supra* at 1. As a result, while for most purposes "[t]he monocular driver may be licensed with only small additional risk for driving," as a general rule such drivers "should not be licensed for commercial vehicle operation." Keeney, *supra* at 20.

The DOT has been authorized by Congress to study the question whether to retain or modify the regulatory ban on monocular drivers of commercial motor vehicles moving in interstate commerce (*see* 49 U.S.C. § 31136), but it has declined to eliminate its general prohibition against monocular drivers of commercial vehicles requiring DOT certification.⁸ On one occasion, the agency has

⁸ Recognizing the capabilities of monocular individuals in general, the DOT conducted an experimental waiver program in an effort to determine whether the agency should modify or abandon its ban on monocular drivers. *See* 61 Fed. Reg. 13,338 (1996); *Advocates for Highway & Auto Safety v. FHWA*, 28 F.3d 1288 (D.C. Cir. 1994). Ultimately, however, the DOT decided to retain its general ban on monocular drivers, concluding that "there were weaknesses in the waiver study design" and that the waiver program "has not produced . . . sufficient evi-

exercised its authority under 49 C.F.R. § 391.41 to make an individualized determination that a monocular driver was qualified to drive commercial vehicles despite his impairment. *Rauenhorst v. United States Dep't of Transp.*, 95 F.3d 715 (8th Cir. 1996). But for the reasons set forth above, the available scientific evidence does not justify treating all monocular individuals as qualified to drive commercial vehicles, even though such individuals are able to drive private passenger vehicles and perform virtually all other significant sight-related tasks without substantial limitation.

III. The Court Of Appeals Erred In Holding That A Genuine Issue Of Material Fact Exists As To Whether Respondent Was "Regarded As" Disabled

As an "alternative" ground for its determination that respondent is disabled under the ADA, the court of appeals held that respondent could be found to be disabled under the "regarded as" prong of the ADA's disability definition. Pet. App. 16a-17a. This "alternative" ground, however, provides no support for the judgment below. In the first place, for the reasons set forth in Part III.A. below, the court of appeals' holding in this regard is dependent on the court's initial conclusion that monocular vision constitutes a disability *per se*. Since the latter determination is erroneous, the former cannot survive either.

Second, even if the "regarded as" holding could properly be viewed as an independent ground for the judgment below, the court's analysis could not withstand

[Footnote continued from previous page]

dence upon which to develop new vision ... standards." 61 Fed. Reg. at 13,340.

scrutiny. The evidence indicates only that Albertsons correctly viewed respondent as a monocular individual whose impairment rendered him unable to satisfy the job-related prerequisites for employment as a commercial truck driver—not that Albertsons regarded him as substantially limited in the major life activities of seeing or working. Thus, there is no basis for a finding of disability under the "regarded as" prong of the statutory definition of disability.

A. The Court Of Appeals' Analysis Of The "Regarded As" Issue Is Fatally Dependent On The Incorrect Premise That Monocular-ity Is A Disability *Per Se*

The "regarded as" prong of the definition of disability provides that an individual is disabled if he or she is "regarded as" having an impairment that substantially limits one or more major life activities, even though the individual does not in fact suffer from such an impairment. 42 U.S.C. § 12102(2)(C). In this case, respondent claims that one of Albertsons' managers described him as "blind in one eye or legally blind." Pet. App. 17a. The court of appeals held that this statement, standing alone, was sufficient to create a "genuine issue of fact regarding whether Albertson's perceived [respondent] as disabled" within the meaning of the ADA. *Id.* at 16a.

The court of appeals' conclusion in that regard was erroneous. Under the statutory definition, an employer's mere recognition that an employee is *impaired*—such as by being "blind in one eye or legally blind"—is insufficient in itself to support a finding that the employee is regarded as *disabled*, unless the perceived impairment (if actually present) would *itself* constitute a disability. This conclusion follows directly from the plain language of the statute: Under prong one of the definition, an individual who actually has an impairment that "substantially limits" a major life activity is disabled in fact. 42 U.S.C. § 12102(2)(A). Under prong three of the

definition (the "regarded as" prong), an individual who is "regarded as having *such an impairment*" is disabled. 42 U.S.C. § 12102(2)(C). The reference to "such an impairment" in prong three is, of course, a reference to the type of impairment previously described in prong one, *i.e.*, an impairment that would, if actually present, render the individual disabled in fact. Accordingly, an employee is not "regarded as" disabled within the meaning of the ADA unless the individual is perceived as having an impairment that "substantially limits" a "major life activity."⁹

As explained in Parts I and II above, the court of appeals erred in concluding that respondent's monocular vision "substantially limits" respondent's "major life activity" of seeing. As a result, the court's "regarded as" analysis cannot withstand scrutiny, because it necessarily proceeds from the incorrect premise that monocular vision is a

⁹ In keeping with the statutory text, every court of appeals to consider this issue has held that a perceived impairment must be substantially limiting, or perceived as substantially limiting, in order for the plaintiff to be "regarded as" disabled. *See Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 153 (2d Cir. 1998); *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 904-03 (10th Cir. 1997), *cert. granted*, No. 97-1943 (U.S. Jan. 8, 1999); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806-07 & n.10 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998); *Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 912 (11th Cir. 1996), *cert. denied*, 118 S. Ct. 630 (1997); *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996); *Cook v. State of Rhode Island*, 10 F.3d 17, 25 (1st Cir. 1993) (Rehabilitation Act case); *Forrisi v. Bowen*, 794 F.2d 931, 934-35 (4th Cir. 1986) (same).

disability *per se*, and hence that an employer's perception that an employee has monocular vision amounts to a perception that the employee is disabled. Since monocular vision is not actually disabling for respondent (or as a general matter), the court of appeals' "regarded as" holding must be reversed.

B. Respondent Was Not "Regarded As" Substantially Limited In A Major Life Activity

Even if the court of appeals' "regarded as" holding were not entirely dependent on its erroneous conclusion that monocular vision is *per se* disabling, reversal would still be required. On this record, there is no basis for a finding that respondent was "regarded as" disabled, because there is nothing to suggest that Albertsons perceived him as substantially limited in the major life activities of seeing or working.¹⁰

1. Respondent Was Not Regarded As Substantially Limited In The Major Life Activity Of Seeing

The record in this case fails to demonstrate that Albertsons perceived respondent's impairment as "substantially limit[ing]" his major life activity of seeing. To the contrary, as explained in Part II above, respondent's monocular vision is in fact *not* disabling, and there is nothing to suggest that Albertsons mistakenly viewed it as more severe an impairment than it actually is. Instead, the record reveals that Albertsons perceived respondent merely as someone who, by virtue of his monocular vision, did not satisfy the job-related qualification standards re-

¹⁰ Respondent claims to be "regarded as" substantially limited in the major life activities of seeing and working. Pet. C.A. Br. 11-13; Resp. C.A. Reply Br. 7-9.

quired to be a truck driver for Albertsons. Albertsons has a consistent policy of employing only truck drivers who meet or exceed minimum DOT standards (J.A. 53), and terminated respondent because "he was not qualified under the DOT minimum requirements." *Id.* at 314, 339. Albertsons' accurate belief that respondent did not meet those standards because of his impairment cannot be bootstrapped into a finding that Albertsons regarded respondent as substantially limited in his ability to see.

That conclusion is bolstered by Congress's understanding of the function served by the "regarded as" provision, which was drawn directly from the Rehabilitation Act. As this Court recognized in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), Congress extended protection to persons who are merely "regarded as" disabled because it was concerned that "society's accumulated myths and fears about disability" are as handicapping as the physical limitations themselves. *Id.* at 284 (discussing the Rehabilitation Act's precursor to the ADA's "regarded as" prong). Plainly, Albertsons' rationale for discharging respondent cannot be equated with the societal "myths and fears" that are the target of this prong of the disability definition. Albertsons did not terminate respondent's employment based on any myths or fears about disability, but instead because he failed to meet a specific job qualification—a qualification based on regulations promulgated by the DOT. Accordingly, there is no basis for a finding that Albertsons "regarded" respondent as substantially limited in the major life activity of seeing.

2. Respondent Was Not Regarded As Substantially Limited In The Major Life Activity Of Working

The fact that respondent was terminated because of his inability to satisfy a prerequisite for a particular job also precludes a finding that Albertsons regarded him as "substantially limited" in the major life activity of

working. Because of his impairment, respondent was foreclosed from driving a truck for Albertsons. That "limitation" on his ability to work is insignificant, not "substantial."

As this Court held in *Bragdon*, administrative and judicial interpretations of the Rehabilitation Act provide persuasive guidance in interpreting analogous provisions of the ADA, including the definition of disability. See *Bragdon*, 118 S. Ct. at 2208 ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates . . . the intent to incorporate [those] interpretations as well."). Thus, Rehabilitation Act cases discussing whether an impairment substantially limits the major life activity of working are highly relevant here, and confirm that respondent was not, and was not "regarded as," disabled in this regard.

For example, in *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), a utility systems repairer suffered from acrophobia and was terminated because he could not climb stairways and ladders. *Id.* at 933. The Fourth Circuit rejected his claim that he was "regarded as" handicapped under the Rehabilitation Act, explaining that an employer does not "regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." *Id.* at 934. Instead, the test is whether the employer finds "the employee's impairment to foreclose generally the type of employment involved." *Id.* at 935. Since the plaintiff had no trouble obtaining jobs in his field, the court held that, "[f]ar from being regarded as having a 'substantial limitation' in employability, Forrisi was seen as unsuited for one position in one plant—and nothing more." *Id.*

Similarly, in *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984), United terminated a flight attendant because his weight exceeded the amount that United had established as the maximum for male flight attendants of his height. *Id.* at 740. The flight attendant

sued United and argued that he was, or was regarded as, substantially limited in the major life activity of working. The court rejected the plaintiff's argument, reasoning that the inability to perform a single job is not a "substantial limit[ation]" of the ability to work. *Id.* at 745. Further, the court concluded, United did not perceive the plaintiff as limited in his activities; "[d]efendant merely regards plaintiff as not being under a certain weight." *Id.* at 746. The court "refuse[d] to make the term handicapped a meaningless phrase." *Id.*¹¹

The common thread running through these cases is that an employee is not "substantially limited" in the major life activity of working if he or she is disqualified from a specific job because of a particular job requirement, even if other employers might impose the same requirement for the same or similar job. It was open to Congress in enacting the ADA to repudiate these courts' interpretations of the Rehabilitation Act, but it did not. Accordingly, this Court should presume that Congress ratified these courts' interpretation when it reenacted the

¹¹ Other Rehabilitation Act cases are to the same effect. See, e.g., *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (mail clerk who suffered from "strabismus" (a cross-eyed condition) was not substantially limited in the major life activity of working even though his impairment rendered him unable to operate a mail-sorting machine and thus led to his termination, because his impairment did not affect "his past work history and ability to carry out other duties at the post office"); *Torres v. United States Postal Serv.*, 610 F. Supp. 593, 594-97 (N.D. Tex. 1985) (mail carrier who was terminated in part because his left-handedness hampered his ability to perform mail "casing" was not handicapped because an impairment which interferes with an individual's ability to do a particular job, but does not significantly decrease his ability to obtain other satisfactory employment, is not substantially limiting).

same statutory language in the ADA. See *Bragdon*, 118 S. Ct. at 2208.

Indeed, even the EEOC's interpretive guidance cites *Forrisi* and *Jasany* with approval in discussing the meaning of "substantial" limitations on the major life activity of working. 29 C.F.R. Pt. 1630, App., Section 1630.2(j).¹² Thus, it is indisputable that an individual who is, or is perceived as being, precluded from performing a particular job is not "disabled." Rather, as the *Forrisi* court explained, the employee's impairment must "foreclose generally the type of employment involved" before it can be found to impose a "substantial limit[ation]" on the major life activity of working.

The EEOC's regulations are consistent with this understanding of the statute. They provide:

The term *substantially limits* means significantly restricted in the ability to perform either a *class of jobs* or a *broad range of jobs in various classes* as

¹² We note that petitioner errs in suggesting that the EEOC's interpretive guidance is entitled to "great deference." Pet. Br. 18 n.6. The EEOC's guidance is merely an interpretive rule issued without notice and comment; as such, it "do[es] not have the force and effect of law and [is] not accorded that weight in the adjudicatory process." *Shalala v. Guernsey Mem. Hosp.*, 115 S. Ct. 1232, 1239 (1995). Since its decision in *General Electric Co. v. Gilbert*, 429 U.S. 124, 140-46 (1976), this Court has consistently held that "the level of deference afforded [to the EEOC's guidance] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). And this Court has never deferred to EEOC guidance that "lacks support in the plain language of [a] statute." *Id.* at 257-58.

compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). A "class of jobs" includes "jobs utilizing similar training, knowledge, skills or abilities" within the geographical area to which the individual has reasonable access. A "broad range of jobs in various classes" encompasses "other jobs not utilizing similar training, knowledge, skills or abilities" as the job from which the individual has been disqualified. *Id.* § 1630.2(j)(3)(ii)(B) and (C).

Under these regulations, and in keeping with *Forrisi* and the other pre-ADA cases discussed above, an impairment is not substantially limiting if the jobs from which it disqualifies the individual amount to something less than an entire "class of jobs" or "broad range of jobs in various classes." Federal courts considering whether an individual is substantially limited in the major life activity of working have consistently adhered to this understanding of the ADA. For instance, in *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366 (11th Cir. 1998), a pilot whose impairment resulted in his termination brought a claim under the ADA, arguing that his employer (Delta) regarded him as significantly restricted in the ability to perform a class of jobs. *Id.* at 1370. The Eleventh Circuit disagreed, holding that "piloting airplanes is too narrow a range of jobs to constitute a 'class of jobs.'" *Id.* "There are non-piloting jobs in the Atlanta area which utilize 'similar training, knowledge, skills or abilities' as piloting jobs," including "pilot ground trainer, flight simulator trainer, flight instructor," and many others. *Id.* Thus, "to establish that Delta perceived him as unable to perform the relevant 'class of jobs,' Witter would have to prove Delta regarded him as unable to perform not just the job of being a pilot, but also the non-piloting jobs we have discussed." *Id.* Because he failed to do so,

he could not show that he was "regarded as" disabled. *Id.*¹³

Like Witter, respondent cannot show that he was regarded as unable to perform any other jobs in his geographic area that utilize "similar training, knowledge, skills or abilities." Respondent could no doubt have obtained any number of transportation-related jobs in his region, and there is no indication that Albertsons perceived him as unable to do so. Nor is there any evidence that respondent was "regarded as" unable to perform other driving-related jobs not requiring compliance with DOT standards.

Accordingly, this case is just like the Rehabilitation Act cases that Congress implicitly approved when it en-

¹³ *Accord, e.g., Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719, 725 (7th Cir. 1998) ("Patterson's impairment must render her incapable of performing any teaching job, not just a specific sort of teaching job. Her impairment 'must substantially limit employment generally.'"); *Thompson*, 121 F.3d at 540 (nurse with lifting restriction who, as a result, could not perform "total patient care" was capable of performing other types of jobs within the health care industry and, thus, was not substantially limited in the activity of working); *McKay*, 110 F.3d at 373 (plaintiff's impairment, which prevented her from performing "repetitive-motion factory work," did not "significantly restrict her ability to perform either a class of jobs or a broad range of jobs in various classes"); *Bridges v. City of Bossier*, 92 F.3d 329, 334 (5th Cir. 1996) ("[A] limitation that prevents one from becoming a firefighter—or even a firefighter and associated municipal paramedic or EMT backup firefighter—... only affects a 'narrow range of jobs.'"), *cert. denied*, 519 U.S. 1093 (1997); *Daley v. Koch*, 892 F.2d 212, 215-16 (2d Cir. 1989) (individual with an impairment that rendered him unsuitable for police work was not substantially limited from working under the Rehabilitation Act).

acted the ADA. As in *Forrisi*, respondent was disqualified from performing a particular job based on a specific job requirement—nothing more. To conclude that respondent, who has held numerous jobs in the transportation industry and elsewhere, was regarded as substantially limited in the major life activity of working would drastically and unjustifiably expand the class of persons protected by the ADA. *Anyone* who is rejected for or terminated from a job based on an impairment—even one that does not interfere with any other major life activity—would be able to claim that they were “regarded as” substantially limited in the major life activity of working. To effectuate the ADA’s “substantially limits” requirement, individuals who claim to have been “regarded as” disabled based on the major life activity of working must show they were perceived as restricted from all other positions in their geographic area that involve “similar training, knowledge, skills or abilities.” This Court should not “construe the Act . . . as a handout to those who” are not substantially limited in any major life activity and who “are in fact capable of working in substantially similar jobs.” *Sutton*, 130 F.3d at 906.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC., PETITIONER,

v.

HALLIE KIRKINGBURG, RESPONDENT.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF AMICUS CURIAE FOR THE AMERICAN
TRUCKING ASSOCIATIONS, ET AL.,
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

The *amici curiae* will address the following question:

Whether an impairment which merely affects, but does not significantly restrict, a major life activity, and which is ameliorated by internal compensating mechanisms or external mitigating measures, falls within the Americans with Disabilities Act's definition of disability as a physical or mental impairment that "substantially limits" a major life activity.

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**BRIEF AMICUS CURIAE OF THE AMERICAN
TRUCKING ASSOCIATIONS, ET AL., IN SUPPORT
OF PETITIONER**

INTEREST OF THE AMICI CURIAE¹

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

The American Moving & Storage Association ("AMSA") is the national trade association of the moving and storage industry. It has approximately 3,500 members worldwide and represents the entire spectrum of the United States domestic moving and storage industry. AMSA's membership includes 25 national van lines, 1,100 independent regulated carriers, 1,600 agents of van lines (1,000 of whom are also regulated carriers), and over 500 international movers.

The Towing & Recovery Association of America ("TRAA") is a national association of more than 1,400 towing and recovery operators serving North America. TRAA is charged with promoting professionalism, quality

¹ The written consents of the parties to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

customer service, and safety in towing operations throughout the country.

The Specialized Carriers & Rigging Association ("SC&RA") is a national association of motor carriers that transport commodities whose unusual size or weight requires special transportation equipment. SC&RA's over 1,000 members include steel haulers, oil field equipment transporters, crane and rigging companies, millwright contractors, and transporters of construction and military equipment.

The Truckload Carriers Association ("TCA") is a national trade association representing the motor carrier industry's irregular-route truckload segment (such as dry van, refrigerated, flatbed, and dump trailers). TCA's more than 600 motor carrier members are domiciled throughout the continental United States, and serve the United States, Mexico, and Canada.

The National Tank Truck Carriers, Inc. ("NTTC") is a national trade association of 200 corporate members specializing in transporting hazardous materials, substances, and wastes in cargo tank trucks. Its members operate throughout the United States, Mexico, and Canada.

The Association of Waste Hazardous Materials Transporters ("AWHMT") is a national association of motor carriers that transport hazardous waste materials, such as industrial and radioactive wastes. Through its approximately 80 members, the AWHMT promotes professionalism and performance standards that minimize risks to the environment, public health, and safety.

The National Automobile Transporters Association ("NATA") represents motor carriers that transport over 95% of all new motor vehicles through either driveaway or truckaway operations. NATA represents the joint interest of

its nineteen carrier members, and seeks continuously to improve their quality of service, safety, and productivity.

The issues at stake in this case are of direct concern to *amici* and their members. *Amici* strongly support, and are deeply committed to, equality of employment opportunity for all persons and believe that discrimination in all forms should be eliminated from the workplace. At the same time, *amici*'s members, as employers of millions of workers, have a large stake in ensuring that the provisions of the Americans with Disabilities Act are fairly applied.

The Ninth Circuit's definition of disability allows individuals whose medical conditions merely make them "different" to qualify as "disabled" persons entitled to the ADA's full panoply of protections. This overly-broad interpretation ignores the statutory requirement that an impairment "substantially limit" one or more of a person's major life activities. At odds with congressional intent, the Ninth Circuit's position would make a huge segment of the American population into "disabled" persons covered by the Act, imposing unwarranted costs on employers and undermining the ADA's goal to eliminate discrimination against the truly disabled. *Amici* have strong interests in establishing a fair and workable standard of disability that, by taking into account internal and external mitigating factors, encompasses only those persons who are truly limited in a major life activity.

STATEMENT

Respondent Hallie Kirkingburg has very poor vision in his left eye, which is caused by amblyopia ("lazy eye"). This condition is not correctable with lenses. However, because Kirkingburg has had the condition since birth, his brain has developed subconscious mechanisms to compensate for his visual deficiencies. Pet. App. 10a, 14a. These mechanisms

have been so effective that over the years Kirkingburg has successfully worked at several jobs that depended on his ability to see.²

As the second largest grocery chain in the country, Albertsons employs scores of over-the-road drivers to transport its goods and has a strict company policy directed at maintaining safe highway conditions: every one of its drivers must meet or exceed minimum Department of Transportation ("DOT") vision standards. Pet. App. 11a. DOT regulations provide that drivers cannot be certified as medically competent to operate commercial vehicles unless their visual acuity scores are at least 20/40, corrected, in both eyes. 49 C.F.R. § 391.41(b) (10). When Kirkingburg began working as a driver for Albertsons in 1990, he could not fulfill these criteria. Although his right eye has a visual acuity rating of 20/20 with corrective lenses, his left eye visual acuity has always been 20/200. Pet. App. 9a-10a.

Inexplicably, two different medical examiners initially certified Kirkingburg as meeting DOT and Albertsons' vision standards. Pet. App. 9a. In 1991, Kirkingburg underwent another eye examination. This time, the examining physician correctly determined that Kirkingburg's left eye visual acuity was 20/200. This did not meet DOT and company standards; thus, the physician refused to certify Kirkingburg. *Id.* at 10a. Because Kirkingburg could not satisfy the necessary vision requirements, Albertsons determined that he was not qualified to drive the company's commercial vehicles and terminated him from his truck driver position. *Id.* at 11a.

² Before working as a truck driver for petitioner Albertsons, Kirkingburg trained and worked as a jet aircraft mechanic and crew chief to the basic air commander (1957-60), worked as an auto mechanic for Los Angeles County (1968-78 or '79), and beginning in 1979, drove commercial vehicles. Appellee Br. at 21 n.6.

A few months later, Kirkingburg presented the company with a vision waiver from the Federal Highway Administration ("FHA"), which he had obtained under a new program that granted exemptions from DOT regulatory requirements. Pet. App. 11a, 37a-38a. Out of concern for public and driver safety, Albertsons has never accepted these waivers for any of its drivers. It declined to do so for Kirkingburg. Pet. App. 11a, 37a, 41a.

Kirkingburg filed suit in the United States District Court for the District of Oregon, claiming that Albertsons violated the Americans with Disabilities Act, 42 U.S.C. § 12110 *et seq.*, by refusing to accommodate his eye condition. Albertsons moved for summary judgment, arguing that Kirkingburg was not a qualified individual with a disability because he could not perform an essential function of his job—satisfying minimum DOT vision standards. The district court granted summary judgment on that ground. Pet. App. 36a-44a.

In a 2-1 decision, the Ninth Circuit reversed. The majority held that Kirkingburg is disabled under the ADA because he is substantially limited in the major life activity of seeing. The majority viewed Kirkingburg's "monocular" vision, in and of itself, as decisive: it necessarily meant that he sees in a "different" manner from most people. In the alternative, Kirkingburg raised a genuine issue of fact as to whether Albertsons regarded him as disabled. The majority further held that Kirkingburg raised a material fact question as to whether he could perform the essential functions of a commercial truck driver, and that Albertsons' policy of requiring drivers to satisfy DOT vision acuity standards, without regard to whether they have FHA vision waivers, is not a valid job-related requirement. Finally, the majority ruled that Albertsons failed to show that Kirkingburg and other waiver recipients posed a direct threat to safety. Pet. App. 8a-28a.

Judge Rymer dissented on the ground that satisfying the DOT's usual vision acuity regulations was an essential function of Kirkingburg's job and that Albertsons was not obliged to employ as a driver a person who satisfied only the requirements of the FHA's experimental waiver program, not the DOT safety standards themselves. Since the DOT had not determined that the vision waiver program was consistent with highway safety, there was no justifiable reason that employers should be compelled to accept such waivers. Pet. App. 28a-33a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision fundamentally—and erroneously—alters the standards that an individual must satisfy in order to qualify as “disabled” under the Americans with Disabilities Act. The first of the ADA's three alternative definitions of disability is “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2)(A). By finding that it is sufficient for a plaintiff merely to possess an impairment that renders him or her “different,” the court of appeals simply discarded much of this language. Gone is the requirement of a significant restriction in functioning, which is plain from the words “substantially limits.” And gone is the emphasis on the “individual.” There is no need to inquire into the consequences of a disorder for a particular person if he or she has a known condition. A diagnosis alone is adequate to ascertain that the person is “different.”

The Ninth Circuit's decision squarely conflicts not only with the plain language of the ADA, but also with its legislative history and with regulations promulgated under the Act. These demand a functional, fact-based analysis of whether an impairment severely constrains an individual. Because the proper approach to the disability determination involves examining an individual's specific limitations, it

necessarily follows that any mitigating measures (such as the plaintiff's natural adaption here) must be taken into account. Otherwise, the person's actual restrictions are ignored.

The Ninth Circuit's approach unjustifiably expands the scope of the ADA by providing coverage to plaintiffs with non-limiting impairments. This distorts the Act's legitimate anti-discrimination goals. It invites strategic behavior by persons with medical conditions that do not impair functioning. And it creates unwarranted costs for employers and co-workers at whose expense mildly limited individuals must be accommodated. This Court should restore the appropriate, congressionally-intended balance to the ADA by making clear (as other circuits have done) that persons are disabled within the meaning of the Act only if they establish that an impairment in fact substantially limits a major life activity.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADA AND ITS IMPLEMENTING REGULATIONS

A. By Equating A Difference With A Disability, The Ninth Circuit Disregarded The ADA's Requirement Of An Individualized, Functional Analysis Of Substantial Limitations

The Ninth Circuit concluded that Kirkingburg is disabled within the meaning of the ADA because his “inability to see out of one eye *affects* his peripheral vision and depth perception.” Pet. App. 14a (emphasis added). Discounting the adjustments that Kirkingburg's brain has made to compensate for his vision deficiencies, the court explained that “Kirkingburg sees using only one eye; most people see using two.” *Id.* at 14a-15a. Based on these conclusory observations, the court held that “there is no question that Kirkingburg is substantially limited in the major life activity

of seeing." *Id.* at 14a. The Ninth Circuit, therefore, focused solely on Kirkingburg's medical impairment and the fact that he sees "differently" from other people. *Ibid.* Because the court stopped at finding an impairment, it read the statutory phrase "substantially limits" out of the text. It neglected to make a reasoned assessment of whether Kirkingburg's monocular vision actually impacts his functioning in a significant way.

The Ninth Circuit's holding that a "difference" is equivalent to a disability should be rejected for a simple reason: the ADA means what it says. In any case of statutory construction, the inquiry begins with the "language of the statute." *Bailey v. United States*, 516 U.S. 137, 144 (1995). Where, as here, "the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, No. 97-1287, slip op. at 5 (U.S. Jan. 25, 1999). By its own terms, the ADA mandates more than just a recognition of a "difference" in, or effect on, the performance of life activities. See *Dutcher v. Ingalls Shipbuilding, Inc.*, 53 F.3d 723, 726 (5th Cir. 1995) ("A physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA"); *Kelly v. Drexel Univ.*, 94 F.3d 102, 108 (3d Cir. 1996) (same). Rather, by defining a disability as a physical or mental impairment that "substantially limits" the individual, the ADA on its face is concerned with severe restrictions in functioning. 42 U.S.C. § 12102(2)(A). See *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) (the "ordinary or natural meaning of 'substantially limits' requires that an impairment significantly restrict an individual's ability to perform a major life activity"); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) ("not every impairment that affect[s] an individual's major life activities is a substantially limiting impairment"); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870-872 (2d Cir. 1998) ("in assessing whether a

plaintiff has a disability, courts have been careful to distinguish impairments which merely affect major life activities from those that substantially limit those activities"); see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1986) (defining "substantial" as "being of moment: important, essential" and "considerable in amount").

The statute also requires analysis of whether an impairment produces significant disadvantages *for the particular person who is seeking to invoke the protections of the Act*. It is simply not possible to gauge the "limits" that a condition imposes on "the major life activities of [the] individual" without examining the individual. 42 U.S.C. § 12102(2)(A). See, e.g., *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 897 (10th Cir. 1997), *cert. granted*, No. 97-1943 (Jan. 8, 1999) (the statutory phrase "with respect to the individual" signifies that there must be an individualized, case-by-case evaluation of whether a given impairment amounts to a substantial limitation). Thus, the dividing line between the "disabled" and the impaired is judged by how an impairment manifests itself in constraints on a person's daily life, and the degree to which it does so. That is the core of the "disability" determination.³

Although the interpretive process need go no further, because the statutory language is unambiguous, the legislative

³ The majority of circuits use this fact-based approach, concentrating on whether the plaintiff has significant limitations in his functional abilities. See *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870-872 (2d Cir. 1998); *Kelly v. Drexel Univ.*, 94 F.3d 102, 106-107 (3d Cir. 1996); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Sutton v. United Air Lines*, 130 F.3d 893, 900-901 (10th Cir. 1997); *Swain v. Hillsborough Cty. Sch. Bd.*, 146 F.3d 855, 858 (11th Cir. 1998). But see *Doane v. City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997) (using "difference" test).

history supports the ordinary understanding of the ADA's definition of disability. Committee Reports from both the House and the Senate highlight the importance of confining disability coverage under the ADA's first prong to those who experience profound limitations in life activities. The reports state that "[a] physical or mental impairment does not constitute a disability * * * for purposes of the ADA unless its severity is such that it results in a 'substantial limitation of one or more major life activities.'" H.R. Rep. No. 485, Pt. II, 101st Cong., 2d Sess., at 52 (1990); S.R. Rep. No. 116, 101st Cong., 1st Sess., at 23 (1989). "[M]inor, trivial impairment[s]" are excluded. *Ibid.* Moreover, in order to decide if a person is "substantially limited," the congressional reports direct the courts to engage in a factual inquiry as to the "condition, manner, or duration under which [life activities] can be performed in comparison to most people." *Ibid.* In sum, the existence of an impairment is not enough. "The ADA includes a functional rather than a medical definition of disability." 136 Cong. Rec. 9072 (1990) (statement of Rep. Bartlett, House Manager of the ADA).

Furthermore, Congress was not writing on a blank slate when it drafted the ADA. The Committee Reports indicate that "the definition of the term 'disability' included in the bill is comparable to the definition of the term 'individual with handicaps'" in the Rehabilitation Act of 1973 ("RHA"), 29 U.S.C. § 701 *et seq.* H.R. Rep. No. 485, Pt. II, at 50; S. Rep. No. 116, at 21. And the ADA itself provides that "nothing in this chapter shall be construed to apply a lesser standard than * * * applied" under the RHA. 42 U.S.C. § 12201(a). At the time the ADA was passed, courts had interpreted the RHA's "statutory language, requiring a substantial limitation" as "emphasiz[ing] that the impairment must be a significant one." *Forrisi v. Bowen*, 794 F.2d 931, 933-934 (4th Cir. 1986). Accordingly, Congress intended the phrase to have the same meaning under the ADA. See

Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998) (Congress's repetition of well-established terms from the RHA in § 12102 (2)(A) of the ADA implies that they should be given the same construction as under the RHA).

The ADA and its legislative history, therefore, preclude a finding of "disability" "based on abstract lists or categories of impairments." *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996); see also *Ryan*, 135 F.3d at 872 ("the determination whether an impairment 'substantially limits' a major life activity is fact specific"). However, that is exactly the method the Ninth Circuit endorsed. The decision below is devoid of any evaluation of the consequences Kirkingburg's monocular vision has upon his life. That Kirkingburg is "almost totally blind in his left eye" (Pet. App. 14a) comprises the beginning and the end of the court's "analysis." Using monocular vision as the touchstone impermissibly recasts the disability determination from an individualized process to a collective approach. If seeing with one eye is tantamount to a disability regardless of the extent to which it impedes the performance of everyday tasks, everyone with that same visual impairment is automatically disabled. On a broader scale, once functionality is eliminated, whether an impairment is a "disability" under the first prong becomes a question of diagnosis instead of actual limitations in life activities. This squarely conflicts with the ADA's focus on each individual's ability level.

The ADA's implementing regulations underscore the vast gulf between the Ninth Circuit's view that an impairment which is a disability for one person is a disability for all and the Act's recognition that "there are varying degrees of impairments as well as varied individuals who suffer from the impairments." *Homeyer*, 91 F.3d at 962. Precisely as Congress envisioned, the EEOC regulations define "substantial limitations" as "[s]ignificant restrict[ions]" in "the

condition, manner or duration" of the plaintiff's activities in relation to the "average person." 29 C.F.R. § 1630.2 (j)(1)(ii). The regulations add that relevant considerations are the nature and severity of the impairment, its duration, and its long-term impact. *Id.* § 1630.2(j)(2). There is no conceivable means by which to undertake any of these assessments without looking beyond a medical diagnosis. Nothing short of a fact-based inquiry into the functional limitations of the particular individual will suffice. See *Bragdon*, 118 S. Ct. at 2202-2206 (conducting a fact-intensive examination of impairment, major life activity, and substantial limitation); *Ryan*, 135 F.3d at 871-872 (using factors listed in § 1630.2 (j)(2) to guide appraisal of plaintiff's specific circumstances); *Katz v. City Metal Co.*, 87 F.3d 26, 31-32 (1st Cir. 1996) (same).

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), the EEOC regulations are entitled to deference. But while the Ninth Circuit referred to the regulations in its opinion, it did little more than that. Pet. App. 14a (citing 29 C.F.R. § 1630.2 (j)(1)(ii) & (j)(2)). The court simply asserted that due to the "the nature of [Kirkingburg's] condition and its permanence," he *must be* disabled. *Ibid.* If the Ninth Circuit had seriously considered the severity and impact of Kirkingburg's monocular vision, it would have ruled in Albertsons' favor. Kirkingburg is not significantly restricted when measured against the "average person"; he did not establish that "he is unable to engage in any usual activity because of his partial blindness." *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (plaintiff with monocular vision who could "perform normal daily activities" was not disabled); see also *Sutton*, 130 F.3d at 902-903 (plaintiffs with poor vision who could "go about all their normal daily activities" in the "same or similar" manner as the majority of the population were not disabled).

In fact, Kirkingburg's body has learned to offset the deficiencies in his vision to such a degree that he has managed to hold steady jobs in various lines of work and has driven trucks for 20 years. Pet. App. 9a. See *Still*, 120 F.3d at 52 (wide range of jobs plaintiff had held demonstrated that he was not legally disabled); *Roth*, 57 F.3d at 1455 (plaintiff's past work experience, including working as a pharmacist, attorney, and university lecturer repudiated his claim that he was significantly restricted in seeing); *Swain v. Hillsborough Cty. Sch. Bd.*, 146 F.3d 855, 857 (11th Cir. 1998) (plaintiff who worked as a teacher and administrator for 20 years was not substantially limited by her physical impairments). In addition, when the Federal Highway Administration issued Kirkingburg a waiver, it presumed that he was capable of driving commercial vehicles. Therefore, to say that Kirkingburg is substantially limited in the major life activities of seeing or working ignores the evidence and defies common sense.

B. Compensating Mechanisms And Mitigating Measures Must Be Factored Into The Determination Of Whether An Individual Is Disabled

The Ninth Circuit's decision dismisses the internal adjustments Kirkingburg's brain makes for his condition. The ADA and its regulations, while silent on the issue of mitigating measures, do not justify such an approach.⁴ To the contrary, by emphasizing the importance of the individual and the current constraints that he experiences as a result of his impairment, the ADA dictates that natural adaptations must be factored into the disability determination. The ADA

⁴ The Court is presented with the question of whether mitigating measures should be considered in the "substantial limitation" analysis in two pending cases, *Sutton v. United Airlines*, No. 97-1943 and *Murphy v. United Parcel Serv.*, No. 97-1992.

expressly covers only those impairments that actually place "substantial limitations" on life activities, not impairments that *may* do so. 42 U.S.C. § 12102(2)(A). If mitigating measures are discounted, the effect is to pretend that substantial limitations exist when, in fact, they do not.

Other courts of appeals have pointed to plaintiffs' own capacities to adjust to their impairments as grounds for finding that they are not "substantially limited" in their life activities. For example, in *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1449, 1455 (7th Cir. 1995), as in this case, the plaintiff's visual condition was not completely correctable with lenses, but he had "'adapted well to daily activities.'" The Seventh Circuit concluded that plaintiff had failed to demonstrate that he was disabled. Similarly, the Fifth Circuit has ruled that a plaintiff was not "substantially limited" because she had "trained herself" to do "'all of the basic things' she needs to do in life with her [injured] arm." *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995).

Even the EEOC's interpretive guidelines, which in critical respects misinterpret the statute, support this position. The guidelines say that disability should be assessed by excluding *external* compensations: "whether an individual is substantially limited in a major life activity must be made * * * without regard to mitigating measures, such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630.2(j) app. This suggests that *internal* adaptations like Kirkingburg's *should* be considered in making the disability determination.

The line apparently drawn in the EEOC's guidelines between internal and external mitigating measures is not, however, a tenable one given the ADA's language and congressional intent that only actual, significant limitations

should lead to a finding of disability.⁵ Properly understood, we believe the ADA requires that both internal *and* external mitigating factors must be taken into account in determining disability. External mitigating measures are just as important as internal mitigating measures in assessing an individual's true capabilities. While the EEOC guidelines appropriately deal with internal adaptations, the same cannot be said for their exclusion of external remedies. See *Sutton*, 130 F.3d at 902 (refusing to follow EEOC interpretive guidance on mitigating measures due to its conflict with the text of the ADA); *Gilday v. Mecosta County*, 124 F.3d 760, 767, 768 (6th Cir. 1997) (same) (Kennedy, J. and Guy, J., concurring in part and dissenting in part).

Internal and external compensating measures similarly affect the extent to which a limitation interferes with life activities. Kirkingburg does not experience "substantial limitations" because adjustments in his brain alleviate the effects of his poor eyesight. Another person may not have a disabling impairment because he can improve his vision with corrective lenses. Likewise, one person may manage his high blood pressure with medication, whereas another may lower it through relaxation techniques, so that neither is restricted in carrying out everyday tasks. In each instance, the end result is identical—the person is not substantially limited in major life activities. Consequently, it is nonsensical to afford the protection of the ADA to one class of plaintiffs but not to the other.

Any contention that legislative history justifies ignoring external mitigating measures is flawed. The Senate Report

⁵ Interpretive guidelines are not entitled to the same deference as regulations. See *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991).

states that under the ADA's first prong "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, *such as reasonable accommodations or auxiliary aids*." S. Rep. No. 116, at 23 (emphasis added). "Reasonable accommodations" and "auxiliary aids" are specifically defined in the statute as job-assistive devices supplied by employers. 42 U.S.C. § 12111(9) (reasonable accommodations include "the provision of qualified readers or interpreters," the "acquisition and modification of equipment or devices," and other "similar" accommodations); 42 U.S.C. § 12102(1) (listing the same measures as auxiliary aids). They do not include employee-supplied mitigating measures. Accordingly, the Senate Report stresses that "personal use items such as hearing aids or eyeglasses" do *not* fall within the definition of reasonable accommodations. S. Rep. No. 116, at 33.

The logical reading of the Senate Report is therefore that a person must first be adjudged as disabled using the "substantially limited" test, which takes account of mitigating measures. Only then, if the person is disabled, do potential reasonable accommodations or auxiliary aids become an issue. See, e.g., 42 U.S.C. § 12112(b)(5)(A) (it is a violation of the Act to neglect to make reasonable accommodations for a qualified individual with a disability); 42 U.S.C. § 12182(b)(2)(A)(iii) (it is a violation of the Act for a place of public accommodation to fail to furnish auxiliary aids to a disabled person).⁶

⁶ The House Report contains the same language as the Senate Report, but adds that a person should be considered "substantially limited" "even if the effects of the impairment are controlled" by medication or medical devices. H.R. Rep. No. 485, Pt. II, at 52. The House Report is in this regard both internally inconsistent and at odds with the Senate Report (not to mention the plain language of the statute). We believe that the Senate Report serves as the better guide.

That the Senate did not intend its reference to "mitigating measures" to encompass personal medications and aids as opposed to on-the-job accommodations is bolstered by its description of the purpose of the "regarded as" prong of the disability definition:

Another important goal of the [regarded as] prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S. Rep. No. 116, at 24.⁷ This passage clearly indicates that

⁷ Of course, an individual who takes medication, wears glasses, or internally compensates for a medical condition is not automatically disabled under the "regarded as" prong. There must be a separate inquiry into whether the employer perceived the individual as having a substantially limiting impairment and discriminated against the individual for that reason. See, e.g., *Kelly*, 94 F.3d at 109; *Ryan*, 135 F.3d at 872. The Ninth Circuit's alternative holding that Kirkingburg had raised a fact question about whether Albertsons perceived him as having a disability ignores these requirements: "substantial limitation" was neither part of the court's inquiry nor part of Kirkingburg's argument. The Ninth Circuit's observation that one manager described Kirkingburg as "blind in one eye or legally blind" shows only that Albertsons perceived him as impaired, not that it perceived him as substantially limited. Pet. App. 16a-17a. Three members of this Court have declared that this does not satisfy the "regarded as" prong. See *Bragdon*, 118 S. Ct. at 2214 n.1 (Rehnquist, C.J., Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part) ("Respondent has offered no evidence to support the assertion that petitioner regarded her as having an impairment that substantially limited her ability to reproduce, as opposed to viewing her as simply impaired").

individuals who can adequately compensate for their impairments are not disabled under the ADA's first prong, 42 U.S.C. § 12102(2)(A), and can only qualify as disabled under the "regarded as" prong. And it can only mean that the assessment of disability under subsection (A) requires looking at the individual's level of functioning with the benefit of ameliorative or corrective measures. Thus, the ADA's legislative history strongly supports taking mitigating measures into account, just as the statutory text requires.

II. THE NINTH CIRCUIT'S "DIFFERENCE" TEST EXPANDS THE ADA BEYOND ITS INTENDED SCOPE AND DISRUPTS THE FAIR DISPENSATION OF ITS BENEFITS

Most circuits employ a functional, fact-based evaluation of whether a plaintiff has significant restrictions. This allows for the fair and even-handed treatment of all potential plaintiffs because eligibility for coverage under the Act turns on each person's specific situation. In contrast, the Ninth Circuit's "difference" test substitutes a medical diagnosis for an individualized examination of a particular plaintiff, thereby overlooking the inevitable variations in ability that occur between people with the same, or similar, impairments. The practical danger with using the Ninth Circuit's approach is that it permits those who have non-limiting or minor impairments to benefit from the ADA's remedial provisions, despite Congress's express directive to the contrary. See S. Rep. No. 116, at 23; H.R. Rep. No. 485, at 52.

This problem is most likely to manifest itself in the numerous cases involving non-traditional impairments. Plaintiffs with conditions such as joint disorders, depression and anxiety, and non-blinding vision problems—conditions that do not always produce obvious limitations—would all be subsumed within the umbrella of the ADA. Although these

conditions can have disparate outcomes and may disable some people but not others, a court would never reach the point of making such distinctions. The mere diagnosis of the impairment would be enough, even if the plaintiff had completely adapted to the condition or experienced only a minor reduction in functioning.

Holihan v. Lucky Stores, Inc., 87 F.3d 362, 364-366 (9th Cir. 1996), provides an example of how the failure to apply the "substantially limits" standard creates a new class of ADA beneficiaries who do not warrant, or require, protection. In *Holihan*, the plaintiff suffered from depression and anxiety. He was terminated as the store manager at a supermarket after he exceeded the six months of medical leave authorized by company policy. When the supermarket refused to rehire him as anything but a clerk, he filed a discrimination suit. The court held that Holihan's mental condition "did not substantially limit any of his major life activities." It was persuaded by the fact that while on leave, Holihan had pursued other business ventures, including selling real estate and setting up a sign-making shop. Under the Ninth Circuit's revised articulation of the disability determination, Holihan would be deemed "disabled" simply because a physician labelled him as having an "organic mental syndrome." The absence of constraints on his daily life, which should readily disqualify him from ADA protection, would be of no moment.

The ADA cannot properly be interpreted in a way that renders the words "substantially limits" superfluous. An observation frequently made by the courts aptly summarizes the consequences of doing so and of indulging the strategic claims of plaintiffs with minor impairments:

[T]he ADA assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the

insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.

Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997); see also *Patrick v. Southern Co. Servs.*, 910 F. Supp. 566, 567 (N.D. Ala.) ("Much of the criticism of the ADA in practice has come from the truly disabled who recognize that * * * attempted stretches [of the definition of disability] can cause negative reaction to the Act and perhaps undermine its true purposes"), *aff'd*, 103 F.3d 149 (11th Cir. 1996).

The Ninth Circuit's expansion of the definition of disability threatens to disrupt the ADA beyond just the threshold disability determination. One of the employers' obligations under the ADA is to provide "reasonable accommodations" to its disabled employees. 42 U.S.C. § 12112(b)(5)(A). Enabling the many individuals who are "different" rather than "disabled" to demand accommodations would potentially impose enormous costs on employers without improving the lot of the truly disabled.

Accommodations to these essentially unimpaired individuals would be a matter of convenience, not legitimate need, and would thus result in unfairness to other employees. For instance, in the trucking industry an often-requested accommodation is a change in route. See, e.g., *Champagne v. Servistar Corp.*, 138 F.3d 7, 10 (1st Cir. 1998) (request to remain on "regular route" due to psychological problems); *Penny v. United Parcel Serv.*, 128 F.3d 408, 410 (6th Cir. 1997) (request to be assigned "lightest route possible" due to back and shoulder problems). Ordinarily, assignments to preferred positions are based on merit or seniority (or are reserved for the truly disabled). But if a driver whose limitations are not genuinely significant has the force of law

behind him, he may be able to demand and get a better or reduced route. Hence, while in this and other circumstances, employers may have to make minimal expenditures, the cost to other employees is always high.

The Ninth Circuit's overreaching may also come at the expense of safety. Many individuals are not sufficiently restricted to be disabled, but nevertheless present genuine safety risks to themselves and others. Employers must be entitled to refuse to hire such employees, particularly in industries where safeguarding the public is a serious concern. See *Joyce v. Suffolk County*, 911 F. Supp. 92, 96-97 (E.D.N.Y. 1996) (officer with 20/200 vision that was correctable to 20/20 was not substantially limited and police force could reject him because officers cannot "call a 'time out' in emergencies while they look for their glasses or lost contact lenses"); see also *Knapp v. Northwestern Univ.*, 101 F.3d 473, 479-482 (7th Cir. 1996) (student with internal defibrillator was not disabled, and university could prohibit him from playing intercollegiate basketball due to risk that he would suffer cardiac death). Otherwise, in complying with the ADA, employers not only jeopardize the public but also open themselves up to huge liabilities for negligence.

As one court expressed it, "'Woe unto the employer who put such an employee behind the wheel of a vehicle * * * which was involved in a vehicular accident.'" *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (citations omitted). And as the district court in this case observed, if Kirkingburg "were ever involved in an accident, defendant would have difficulty explaining why it hired a driver who could not meet DOT vision requirements." Pet. App. 41a.

Employers should not have to choose between violating the ADA or being sued for negligence.⁸

The Ninth Circuit's "difference" test creates a perverse incentive to misrepresent non-limiting impairments when convenient to secure employment. A good example of this is *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995), in which a would-be pediatrician claimed that he had been discriminated against during the selection process for a residency program due to his poor vision. Dr. Roth was born with eye impairments that altered his ability to fuse images and to sense depth. *Id.* at 1449. He alleged that these problems prevented him from pursuing his chosen profession because he could not work for more than eight to ten hours at a time and all residency programs require long shifts. *Id.* at 1454. On school and job applications, however, Dr. Roth either failed to list his visual condition when specifically asked about "handicaps" or characterized himself as "cured." *Id.* at 1448. He completed pharmacy and law degrees—earning the latter full time while working as a pharmacist—and served as a faculty lecturer and defense attorney/consultant while attending medical school, all without accommodation. *Id.* at 1455-1456. The Seventh Circuit denied Dr. Roth's request for a preliminary injunction ordering his admission to the residency program, holding that he was not substantially limited in seeing or learning. Dr. Roth's impairment may have "affected" his major life activities, but it did not "ris[e] to the level of a disability." *Id.* at 1454.

⁸ The defense that the employee is not "qualified" and poses "a direct threat to the health or safety of other individuals" may not always shield employers in this situation. 42 U.S.C. §§ 12112(a), 12113(b). Plaintiffs who are covered under the ADA because they are "different" do not have significant functional restrictions; therefore, a court might find them "qualified" and dismiss safety standards that exclude them as being unnecessarily strict.

The application of the Ninth Circuit's "difference" test to these facts would produce an absurd and unjust result. Dr. Roth's diagnosed eye conditions and the evidence that they had some effect on his sight would render him disabled. Ignored would be the contrary evidence that he could perform lengthy, uninterrupted, eye-straining work, and the fact that he had informed employers and educators that he suffered no limitations. In short, Dr. Roth would be permitted to use his impairment "when it was beneficial and opportune"—to get him the job of his choice. 57 F.3d at 1456. But as the Seventh Circuit observed, "there is a clear bright line of demarcation between extending the statutory protection to a truly disabled individual (so that he or she can lead a normal life * * *) and allowing an individual with marginal impairment to use disability laws as bargaining chips to gain a competitive advantage." *Id.* at 1460.

The benefits an individual can receive under the ADA certainly carry the potential to encourage opportunistic behavior. The Ninth Circuit's "difference" test would reward that behavior, transforming the ADA into an instrument through which individuals with minor impairments can obtain the jobs of their choice, structured as they choose, in the process generating unacceptable costs for employers, employees, and the public. *Amici* urge this Court to make clear that only real disabilities that substantially impinge on a person's ability to carry out normal life functions when internal compensations or external mitigating measures are taken into account, are within the protection of the ADA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States
October Term, 1998

ALBERTSONS, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF
JAMES STRICKLAND, SR., ET AL.,
IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The *amici curiae* will address the following question:

Whether a private employer violates the Americans with Disabilities Act by refusing to hire a truck driver who has a valid Commercial Driver's License solely because that driver has not met a vision standard that the Federal Highway Administration has determined fails to measure a monocular driver's ability to operate a truck safely.

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BRIEF AMICUS CURIAE OF JAMES STRICKLAND,
SR., ET AL., IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE¹

Amici James Strickland, Sr., Dorian Holladay, George Hahn, Glenn Gee, Richard Carlson, and David Rau-
enhorst are all truck drivers with monocular vision who
have driven hundreds of thousands of accident-free miles
in their careers. However, because of their monocular
vision, these drivers are unable to meet the Federal High-
way Administration's ("FHWA") vision standard, 49
C.F.R. § 391.41(b)(10) ("vision standard").² Meeting the
vision standard has been a prerequisite for obtaining a
Commercial Driver's License ("CDL") that permits one to
drive a truck interstate. However, in 1992 the FHWA
introduced a vision waiver program that permitted
monocular drivers to obtain a CDL provided they met a
variety of other requirements, including having a safe
driving record. *Amici* have either obtained or are in the
process of applying for vision waivers that would permit
them to obtain an interstate CDL. Each of the drivers is
discussed more fully below.

¹ This brief was not authored in whole or in part by counsel
for any party, and no person or entity other than *amici* and their
counsel made a monetary contribution to the preparation or
submission of this brief.

² For purposes of this brief, *amici* will use the term
"monocular" to refer to a person who meets the FHWA standard
in one eye but not both.

James Strickland, Sr. is a resident of North Carolina who began driving tractor-trailers in 1991. In August of 1993, he lost sight in one eye and could therefore only legally drive trucks intrastate. Since that time, he has driven tractor-trailers 250,000 miles without an accident. In 1995, Mr. Strickland applied for a waiver of the FHWA vision standard. In late 1998, he updated his application, requesting an "exemption" rather than a waiver under the procedures established by the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) ("TEA-21"). TEA-21 reconfirms the authority of the FHWA to grant waivers from its vision standard, but now uses the term "exemption" to describe the type of action Mr. Strickland seeks. He is awaiting the FHWA's decision on his application.

Dorian Holladay, a resident of Arizona, George Hahn, a resident of Wisconsin, and Glenn Gee, a resident of Texas, have also applied for exemptions pursuant to the FHWA regulations that were implemented following the passage of TEA-21. Mr. Holladay, who lost his vision in one eye when he was a child, has driven straight trucks and tractor-trailers for the last 39 years. He has been self-employed since 1988, during which time he has driven over 1 million accident-free miles. Mr. Hahn, who lost his vision in one eye when he was 18, has driven tractor-trailers over 2.5 million accident-free miles over the past 25 years. Mr. Gee, who lost his vision in one eye as a child, has driven both straight trucks and tractor-trailers for the last 29 years. Over this time period, he has driven 1 million accident-free miles.

Richard Carlson, a resident of Minnesota, will soon be granted an exemption by the FHWA. See Qualification

of Drivers, Exemption Applications, 63 Fed. Reg. 66226, 66227 (Dec. 1, 1998) (Notice of Intent to Grant Applications). He lost his vision in one eye when he was a child. He has been self-employed for the last ten years, during which time he has driven over 1 million accident-free miles.

David Rauenhorst, a resident of Minnesota, was granted a waiver effective January 9, 1998. See Qualification of Drivers, Waiver Application, 63 Fed. Reg. 1524 (Jan. 9, 1998) (Notice of Final Disposition). At the time he applied for a waiver, he had driven for 22 years and 1 million miles without an accident.

Without a FHWA-issued waiver of the vision standard, a monocular driver's employment opportunities are severely restricted since many companies who carry goods interstate are unable to hire these individuals. The vision waiver permits monocular drivers to compete for these jobs on an equal footing with other drivers. However, the waiver will become meaningless if employers are free to disregard CDLs issued to drivers with monocular vision despite the FHWA's findings that these drivers are safe and that it is in the public interest to grant them waivers. As a result, *amici* have a substantial interest in this case. *Amici* respectfully submit this brief to aid the Court's understanding of the history of the vision waiver program and its relationship to the Americans with Disabilities Act ("ADA") and § 504 of the Rehabilitation Act of 1973 ("§ 504"). Both Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The FHWA has adopted certain physical standards that truck drivers must meet in order to obtain an interstate CDL. One of those standards, last revised in 1971, sets out criteria related to vision, and would deny CDLs to drivers whose vision in either eye falls below a certain level. *See* 49 C.F.R. § 391.41(b)(10). In recent years, the FHWA has acknowledged that its 1971 vision standard does not measure the essential functions of the job of driving a truck safely. The FHWA has therefore issued waivers to several thousand monocular drivers, implicitly acknowledging that strict enforcement of its vision standard would discriminate against those drivers in violation of § 504. In issuing those waivers, the FHWA found that the monocular drivers it granted waivers to were as safe as those drivers who met the underlying vision standard itself and that issuance of the waivers would be in the public interest.

Even though Respondent Hallie Kirkingburg had obtained a CDL through the waiver procedure, Petitioner Albertsons refused to hire him. It did so specifically because of his disability. Rather than accepting the FHWA findings that Mr. Kirkingburg was a safe driver, Albertsons insisted that he meet the very vision standard that the FHWA has declined to enforce. Such reliance on a job standard that does not measure the essential functions of the job at issue violates the ADA. Albertsons cannot simply ignore the FHWA's decision and try to enforce a more stringent and discriminatory standard.

The vision waiver program, contrary to Albertsons' claim, was not an "experiment," but rather was a means

of certifying monocular drivers the FHWA knew were safe while gathering unbiased data which would provide the basis for a new vision standard. The FHWA carefully examined what was necessary to drive a truck in interstate commerce and assessed the individual records of each driver to whom it proposed to issue a waiver. That waiver procedure is authorized by the Motor Carrier Safety Act, Pub. L. No. 98-554, 98 Stat. 2832 (1984) ("MCSA"), and by the recently-enacted Transportation Equity Act for the 21st Century. In contrast to the FHWA, Albertsons simply required adherence to an outdated standard, discriminating against Mr. Kirkingburg on the basis of stereotypes and unfounded assumptions. The Ninth Circuit's decision should therefore be affirmed.

ARGUMENT

I. THE FEDERAL HIGHWAY ADMINISTRATION'S VISION STANDARD DOES NOT MEASURE A MONOCULAR DRIVER'S ABILITY TO OPERATE A TRUCK SAFELY.

A. History And Effect Of The Vision Standard

Congress has granted the Department of Transportation ("DOT") the authority to implement policies and programs that contribute to the safety, speed, and efficiency of transportation. *See* 49 U.S.C. § 101. Within the DOT, the FHWA is the agency with the power to regulate motor carrier safety. 49 U.S.C. §§ 104(a), (c). The FHWA develops and implements Federal Motor Carrier Safety Regulations ("FMCSRs") that prohibit unqualified

persons from operating commercial motor vehicles ("CMVs") in interstate commerce. See 49 C.F.R. § 391.11(a).

To obtain a CDL to operate a truck in interstate commerce, a driver must meet the criteria of 49 C.F.R. § 383.71, which include skill, knowledge, and certain physical requirements. The physical requirements include 49 C.F.R. § 391.41(b)(10) (the "vision standard"). The vision standard was first implemented in 1937 by the Interstate Commerce Commission. See *Qualifications of Drivers*, 57 Fed. Reg. 6793 (Feb. 28, 1992) (Advance Notice of Proposed Rulemaking). The original standard required "good eyesight in both eyes (either without glasses or by correction with glasses), including adequate perception of red and green colors." *Id.* The vision standard was revised several times over the years to require increased visual acuity. See *id.* at 6793-94. The current vision standard has remained unchanged since 1971 and requires that an individual have:

[D]istant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

49 C.F.R. § 391.41(b)(10).

The FHWA established the current vision standard to "prevent individuals who will present an unreasonable

and avoidable safety risk to other users of the highways from being allowed to operate vehicles which, because of their size or cargo, present a grave hazard." *Qualification of Drivers*, 57 Fed. Reg. 10295 (Mar. 25, 1992) (Notice of Intent to Accept Applications for Waivers). Prior to the introduction of the waiver program in 1992 which allowed drivers with good vision in one eye and a proven history of driving safety to obtain CDLs, the FHWA enforced the vision standard as a mandatory prerequisite to receiving an interstate CDL. Drivers who could not meet the vision standard were denied a CDL and could not legally be employed to drive a CMV in interstate commerce.

Furthermore, since 1984 many states have adopted the vision standard in response to the MCSA. See *Qualification of Drivers*, 59 Fed. Reg. 50887, 50888 (Oct. 6, 1994) (Notice of Determination) (stating "Congress has insisted on uniform [state] standards consistent with Federal regulations issued pursuant to the MCSA of 1984 and has authorized programs to encourage states to adopt those standards."). As a result, prior to the 1992 introduction of a vision waiver program, monocular drivers with impeccable safety records were often no longer able to drive at all due to the rigid enforcement of the vision standard. That enforcement had a significant financial impact on monocular drivers, including several of the *amici* since, as the FHWA has recognized, a license to drive a CMV in interstate commerce can increase earning potential. See 57 Fed. Reg. 10295.

In 1992, the FHWA finally acknowledged that monocular vision drivers could compensate for their disability and thus drive safely even if they did not meet the vision

standard. Pursuant to its 49 U.S.C. § 31136(e)(1) authority to grant waivers that are consistent with the public interest and the safe operation of CMVs, the FHWA instituted a vision waiver program that permitted monocular CMV operators who had demonstrated safety records to obtain a CDL. By granting vision waivers to drivers it determined to be safe, the FHWA allowed monocular drivers the same opportunities as other drivers while maintaining the current level of highway safety. In 1998, Congress reconfirmed FHWA's authority to grant waivers of the FHWA's physical standards in the Transportation Equity Act for the 21st Century, Pub L. No. 105-178, 112 Stat. 107 (1998); *see also* 63 Fed. Reg. 67600 (Dec. 8, 1998) (Interim Final Rule Implementing TEA-21).

B. Monocular Drivers Can Be Otherwise Qualified To Drive Safely In Interstate Commerce Without Meeting The FHWA Vision Standard.

The FHWA's issuance of the waivers of the vision standard has been integral to the FHWA's ability to regulate highway safety while fulfilling its non-discrimination obligations pursuant to § 504 of the Rehabilitation Act of 1973. As explained below, the vision standard does not measure whether monocular drivers can drive safely, and thus the FHWA would have violated § 504 if it had continued to enforce that standard and deny CDLs to monocular drivers who could operate CMVs safely despite their disability.

§ 504 of the Rehabilitation Act prohibits federal agencies such as the FHWA from discriminating against

individuals based on their disabilities. The Rehabilitation Act provides that:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

To establish a prima facie case of a § 504 violation, a plaintiff must prove (1) that he has a disability; (2) that he is otherwise qualified for the employment in question; and (3) that he was excluded from employment solely on the basis of his disability. *Doe v. Univ. of Maryland Medical System Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995). For purposes of this discussion, *amici* will assume that individuals with monocular vision are individuals with a disability, while recognizing that this issue is before the Court in this case. Furthermore, there is no dispute that the FHWA has in the past denied monocular drivers CDLs solely on the basis of their disability; i.e., because their eyesight could not meet the visual acuity ratings in 49 C.F.R. § 391.41(b)(10). Thus the only determination to be made in assessing the potential discriminatory effect of the FHWA vision standard is whether monocular drivers are otherwise qualified.

Pursuant to § 504, a qualified individual with a disability is "with respect to employment, a handicapped

person who, with reasonable accommodation, can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1). FHWA regulations make clear that the function essential to driving a CMV in interstate commerce is the ability to operate a CMV safely. See 49 C.F.R. § 383.1 (explaining that CDL standards were promulgated to "help reduce or prevent truck and bus accidents, fatalities, and injuries"); 57 Fed. Reg. at 10295 ("The purpose of establishing vision standards for drivers of CMVs is to prevent individuals who will present an unreasonable and avoidable safety risk to other users of the highways from being allowed to operate vehicles which, because of their size or cargo, present a grave hazard.").

Driving safely in interstate commerce is a general ability that depends on many other specific abilities such as the ability to change lanes properly, use signals appropriately, and monitor the air brake system. See 49 C.F.R. § 383.113. In its effort to ensure that only safe drivers are licensed, the FHWA requires CDL applicants to meet the standards set forth in the FMCSRs. The FHWA has assumed that the visual acuity ratings that the FMCSRs require will ensure that only safe drivers are allowed to operate CMVs. The FHWA, however, is also obligated by § 504 to ensure that the vision standard only excludes drivers because they are not safe and not merely because they are monocular.

Therefore, to comply with § 504, the FHWA must ensure that the criteria it imposes to ensure highway safety actually measure whether each individual has the ability to drive safely, which is the essential function of driving a CMV. See *Pandazides v. Virginia Bd. of Educ.*, 946

F.2d 345, 349 (4th Cir. 1991) (holding that qualified individual need only fulfill the requirements of a job that measure the position's essential functions). Essential functions are those functions that are necessary to the successful performance of the job in question; marginal functions are not included. See *Southeastern Community College v. Davis*, 442 U.S. 397, 406-07 (1979). In other words, there must be a close nexus between the essential functions and the job position:

[D]efendants cannot merely mechanically invoke any set of requirements and pronounce the handicapped applicant or prospective employee not otherwise qualified. The district court must look behind the qualifications. To do otherwise reduces the term "otherwise qualified" and any arbitrary set of requirements to a tautology.

Pandazides, 946 F.2d at 349. This Court has also held that physical qualifications should be examined to determine whether they are necessary to the position or service in question. See *Davis*, 442 U.S. at 407. Furthermore, this inquiry must be individualized in most cases and based on appropriate findings of fact. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987). All FMCSRs pertaining to driver qualifications, including the physical requirements, must therefore measure whether an individual can safely operate a CMV in interstate commerce.

There is compelling evidence that the vision standard does not actually measure a monocular individual's ability to drive safely and that rigid adherence to this standard would discriminate against monocular drivers who can drive safely. The legislative history of the ADA,

studies on monocular vision, and the FHWA's issuance of vision waivers to thousands of qualified monocular drivers indicate that the vision standard by itself cannot be relied on to determine whether monocular drivers are safe.

When Congress passed the ADA in 1990, members of both the House and Senate expressed doubt as to whether FHWA physical requirements were consistent with the ADA and § 504. Congress expected the Secretary of Transportation to "undertake a thorough review of these regulations [FMCSRs] to ascertain whether the [physical] standards conform with current knowledge about the capabilities of persons with disabilities. . . . [and] make any necessary changes within the two year period to bring such regulations into compliance with the law." H. Rep. No. 101-485, Part 2, 101st Cong., 2d Sess. 57 (1990) (House Committee on Education and Labor); *see also* H. Rep. 101-485, Part 3, 101st Cong., 2d Sess. 34 (1990) (House Committee on the Judiciary); S. Rep. 101-116, 101st Cong., 1st Sess. 27-28 (1989) (Senate Committee on Labor and Human Resources).

In response to Congress' concern, the FHWA commissioned Ketron, Inc. to study the relationship between vision deficiencies and safe driving and also reconsidered an earlier study conducted by Bartow Associates, Inc. *See Rauenhorst v. U.S. Department of Trans., Federal Highway Admin.*, 95 F.3d 715, 717-719 (8th Cir. 1996). The Ketron study reported a lack of empirical data upon which to find any correlation between driver safety and vision disorders. *See Qualification of Drivers*, 57 Fed. Reg. 31458 (July 16, 1992) (Notice of Final Disposition). The prior study conducted by Bartow Associates had reviewed the driving studies that had been used in the past to support

the need for 49 C.F.R. § 391.41(b)(10). *See Rauenhorst*, 95 F.3d at 719; Bartow Associates, Inc., *The Monocular Driver: A Review of Distant Visual Acuity Risk Analysis Data* (Sept. 1982) at 1 ("Bartow Study"). The Bartow Study found that many of the previous studies supporting the FHWA's vision standard had been flawed due to "small sample sizes, lack of controls, and the potential dominance of other variables." 57 Fed. Reg. at 6794 (summarizing Bartow Study). Previous studies also failed to recognize that visually impaired drivers learn to drive within their limitations. *Rauenhorst*, 95 F.3d at 719. Furthermore, the findings of the studies supporting the vision standard were misleading since they used test subjects who had not yet learned to compensate for their visual disorders, such as binocular individuals with one eye closed or individuals who had recently been blinded in one eye. Bartow Study at 6, 37-38 & Summary. These studies also failed to consider the monocular driver's ability to use monocular cues. *Id.* at 24.³ In fact, drivers acquired safe driving records irrespective of their visual acuity. *Id.* at 16. The Bartow Study reveals that some monocular drivers can compensate for limitations in their vision, which is not taken into account by a vision standard that only tests for "good eyesight in both eyes."⁴ 57 Fed. Reg. at 6793.

³ For instance, Mr. Kirkingburg's doctor testified that people with monocular vision develop "monocular cues" to depth perception and that Mr. Kirkingburg could thus "easily perform the driving tasks required of him." (J.A. 152).

⁴ This language appeared in the 1937 version of the vision standard. While the specific formula for the vision standard has changed, it still categorically excludes drivers with monocular vision.

The inherent weakness in the vision standard is further demonstrated by the fact that the FHWA no longer applies it to assess the capabilities of monocular drivers. The FHWA's implementation of a vision waiver program was designed to ameliorate the discriminatory impact of using an absolute vision standard as the sole method by which a driver can obtain a CDL. Faced with Congress' order to revise physical standards that did not comply with the ADA and § 504, the FHWA, on March 25, 1992, announced its intention to accept applications for waivers from the vision requirements for carefully selected qualified individuals. 57 Fed. Reg. 10295. Because the FHWA lacked sufficient empirical data to support the current vision standard as an accurate measure of safe driving, the waiver program was to be a means of certifying monocular drivers the FHWA knew were safe while gathering unbiased data which would provide the basis for a new vision standard. *See id.*

Since the FHWA could not identify a purely physical visual standard that accurately measured safety, the waiver program required monocular drivers to exhibit alternative qualifications which did correlate to driver safety. In fact, the FHWA has stated that these requirements hold monocular drivers to a "slightly higher standard" of safety. *See* 57 Fed. Reg. at 31459. The initial waiver program required monocular individuals to meet a number of requirements, including demonstrating three years of CMV driving experience with: (1) no suspensions or revocations of the individual's driver's license for operating violations in any motor vehicle; (2) no reportable CMV accidents in which the individual was cited for a moving violation; (3) no convictions for a disqualifying

offense under 49 C.F.R. § 383.51 or more than one serious traffic violation under 49 C.F.R. § 383.5; and, (4) no more than two convictions for any other CMV traffic violations. *See id.* at 31460. Further, applicants who obtained waivers were required to report any traffic violations or accidents within 15 days of the occurrence and submit documentation of an annual ophthalmologist's examination that certified the driver's visual acuity was at least 20/40 (Snellen), corrected or uncorrected in the better eye. *Id.* at 31460-61. The reporting requirement thus allowed the FHWA to reassess the waivers it granted to prevent any unnecessary danger to the public.⁵ *See* 57 Fed. Reg. at 31460.

Using a proven history of safe driving as a proxy for safe driving ability was consistent with the safety studies the FHWA had already completed. Those studies showed that a crucial issue in safe driving is the ability to recognize one's limitations and then drive within those limitations. *See* Bartow Study at 23. The FHWA therefore reasonably believed that monocular individuals who had proven histories of safe driving had learned to drive within the limitations of their disability and could do so safely. The FHWA further substantiated its position by re-issuing findings that monocular drivers who met the criteria of the waiver program and who received waivers did not compromise the safe operation of CMVs. *See* Qualification of Drivers, 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994)

⁵ By September of 1994, the FHWA had revoked the waivers of 201 drivers for failing to comply with the reporting requirements. *See* 59 Fed. Reg. at 50890.

(Notice of Final Determination). The standards implemented under the waiver program measured the ability to use visual cues through experience and produced a group of drivers with safety ratings that exceeded those of drivers as a whole. See 59 Fed. Reg. at 50890.

The use of alternative safety criteria such as a proven history of safe driving resulted in the FHWA licensing thousands of safe monocular drivers, although the agency drew criticism for its inability to formulate a new vision standard applicable to all drivers.⁶ See 59 Fed. Reg. at 59389-90. The vision standard itself was not revised since the waiver program's determination that certain monocular drivers were safe was based primarily on criteria not directly related to vision. Thus, while the vision standard could for the time being be used to certify binocular drivers, it did not measure the essential function of safety with regard to monocular drivers.⁷

The history of the FHWA vision standard and the waiver program demonstrates that the rigid vision standard does not accurately measure the essential functions of the job in question and discriminates against individuals with monocular vision. Thousands of monocular

⁶ The FHWA issued 2,411 vision waivers between 1992 and 1994. See 59 Fed. Reg. at 50889.

⁷ The FHWA indicated that the vision standard would be changed when sufficient data existed to support a non-discriminatory standard that could be applied to all drivers. "The agency's ultimate goal is to adopt driver physical qualification standards that are performance-based; that is, they will reflect the actual physical requirements that fosters safe operation of commercial vehicles." 59 Fed. Reg. at 59390.

drivers have been recognized by the FHWA as safe operators of CMVs in interstate commerce and have demonstrated their ability to drive safely through hundreds of thousands of accident and violation free miles. Without a waiver program these drivers would be denied CDLs on the basis of a physical disability that does not impact their driving skill and the FHWA would be in violation of § 504.

II. ALBERTSONS' REFUSAL TO ACCEPT FHWA VISION WAIVERS DISCRIMINATES AGAINST MONOCULAR DRIVERS IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT.

Like the FHWA, Albertsons cannot rely on the vision standard as an indication of whether Mr. Kirkingburg can perform the essential functions necessary to be a truck driver. Mr. Kirkingburg presented Albertsons with a valid CDL, which confirms his ability to drive safely, and Albertsons cannot refuse to accept that CDL simply because it is held by a monocular driver. By imposing a FHWA vision standard from which the agency has exempted Mr. Kirkingburg, Albertsons is enforcing its own discriminatory physical standards in violation of the ADA. Monocular truck drivers such as Mr. Kirkingburg and *amici* have invested considerable time and financial resources to obtain waivers which reflect their ability to drive safely and increase the job opportunities available to them. Permitting private motor carriers such as Albertsons to categorically reject monocular drivers with valid CDLs makes the waiver provisions meaningless and perpetuates discrimination on the basis of the drivers' disability.

A. The Vision Standard Is An Illegal Criterion Upon Which To Deny A Monocular Driver Employment Since It Does Not Measure A Driver's Ability To Operate A Truck Safely.

As previously discussed, the FHWA would have violated § 504 if it had continued to use the vision standard as the only means of licensing monocular drivers. In this case, since Albertsons has refused to accept Mr. Kirkingburg's waiver, it is doing exactly what the FHWA cannot do: it is applying the vision standard as an absolute and necessary test of an individual's ability to drive safely. Albertsons has therefore violated the ADA, which provides the same protection to individuals with disabilities as does the Rehabilitation Act:

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a); *see also* *Bragdon v. Abbott*, 118 S.Ct. 2196, 2202 (1998) (stating "the directive [42 U.S.C. § 12201] requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.").

As with § 504, an employee must be able to carry out the essential functions of the position to be protected by the ADA. 42 U.S.C. § 12111(8). Albertsons describes compliance with the FHWA standards as one such essential function. *See* Pet. Brief at 35-36. Albertsons is therefore using the vision standard as a necessary criterion for

employment as a truck driver. *Id.* However, having a certain level of visual acuity in both eyes is not an essential function for that job, as the FHWA has recognized. Rather, the essential function of driving a CMV for Albertsons is being able to drive safely in interstate commerce, and Albertsons concedes as much.⁸ Nevertheless, Albertsons has chosen to measure the ability of all prospective employees to perform this essential function by requiring them to meet the FHWA's vision standard, even though it has done no independent assessment of whether the standard is "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). It offers no scientific, practical or other evidence to show that monocular drivers are less safe driving Albertsons' trucks than they would be driving anyone else's. Albertsons has simply adopted the outdated FHWA standard.⁹

⁸ Albertsons at various points in its brief has identified the ability to drive safely as a prerequisite, an essential function, and as an affirmative defense. Pet. Brief at 30, 35-36, 38. Regardless of how the ability to drive safely in interstate commerce is categorized, the vision standard must measure whether monocular drivers can drive safely or it is in violation of the ADA.

⁹ Albertsons incorrectly claims that it is not required to justify its qualitative standards. *See* Pet. Brief at 33-34. While Albertsons does not have to justify its performance-based standards, it must justify standards which are not consistent with business necessity. *See Pandazides*, 946 F.2d at 349 (stating "[D]efendants cannot merely mechanically invoke any set of requirements and pronounce the handicapped applicant or prospective employee not otherwise qualified"). The only justification Albertsons offers for requiring compliance with the vision standard is its irrational fear that Mr. Kirkingburg is unsafe. *See* Pet. Br. at 38.

In denying monocular drivers employment because they cannot fulfill a requirement unrelated to the job, Albertsons is essentially asserting that it has a legal right to discriminate against individuals based on "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society." 42 U.S.C. § 12101(a)(7). The ADA specifically prohibits this type of discrimination. The FHWA vision standard, standing alone, does not measure the essential functions of driving a CMV in interstate commerce, and a private employer like Albertsons cannot rely on that standard any more than the FHWA can.

B. A Private Employer Like Albertsons Cannot Ignore The FHWA's Waiver Of The Vision Standard For A Particular Driver.

The FHWA is the federal agency that possesses the expertise and resources to determine the criteria necessary to ensure vehicle and highway safety. Albertsons argues that it can require its drivers to meet the FHWA vision standard regardless of whether these drivers have obtained vision waivers and valid CDLs. Pet. Br. at 30, 33-34. In essence, Albertsons is claiming that it can simply ignore the FHWA's conclusions concerning the vision standard, and substitute its own more stringent standard even if that privately-adopted standard discriminates against persons with disabilities. By refusing to recognize the waiver procedure, Albertsons "cements in place obsolete or inaccurate administrative standards, even when these standards are replaced by new benchmarks which are carefully drafted to assure that improvements and

developments in the equipment of the vehicles and additional developments as to the nature and adaptations to a disability can and do compensate successfully for certain disabilities." *Rauenhorst*, 95 F.3d at 722.

Albertsons' position turns on the argument that actions taken by the FHWA under the statutorily authorized waiver procedure are flawed. However, contrary to Albertsons' assertion, the FHWA's waiver program is not a mere "experiment." See Pet. Br. at 13, 41, 44-45. Rather, it is an integral part of the federal highway safety regulatory structure. Albertsons is not free to disregard the FHWA's decision to issue a waiver to Mr. Kirkingburg, since vision waivers are issued pursuant to FHWA regulations that ensure such waivers maintain highway safety. See 49 U.S.C. § 31136(e)(1).

When Mr. Kirkingburg re-applied to work at Albertsons, he presented a valid interstate CDL that had been obtained following extensive administrative proceedings at the FHWA. While the FHWA has the authority to promulgate minimum standards requiring that drivers are physically able to operate CMVs safely, see 49 U.S.C. § 31136(a)(3), it also has the authority to waive FMCSRs when a waiver is consistent with the public interest and the safe operation of CMVs in interstate commerce. See 49 U.S.C. § 31136(e)(1). Waivers issued pursuant to the waiver program were based on each individual's proven ability to drive safely and the FHWA's conclusion that the "level of safety for CMV operations will remain unchanged as a result." 57 Fed. Reg. at 31459. The FHWA announced its intention to accept applications for vision waivers in the Federal Register, detailed the requirements for a successful application, called for comments on the

proposal, responded to comments received, and subsequently announced its decision to grant waivers. *See* 57 Fed. Reg. at 10295; Qualification of Drivers, Waiver Applications, 57 Fed. Reg. 23370 (Jun. 3, 1992) (Request for Comments); 57 Fed. Reg. 31458. The issuance of these waivers is a legally adopted modification of the standard that is necessary to avoid illegal discrimination; it does not, as Albertsons contends, lower the safety requirements. *See* 57 Fed. Reg. at 31459 (stating that in issuing waivers the FHWA "is not relaxing its vision requirements, as contained in the FMCSRs.").

Amici recognize that the FHWA does not prevent an employer from adopting safety standards that are more stringent than those in the FMCSRs. *See* 49 C.F.R. § 390.3(d). However, that does not give private motor carriers a license to discriminate against otherwise qualified drivers with disabilities. *See* 42 U.S.C. § 12112(a). To the contrary, an employer cannot adopt a standard that fails to take into account the particular features of the job at issue *and* the particular abilities of the employee involved. As explained above, Albertsons' new standard ignores the FHWA's finding that the vision standard does not measure the essential functions of this job. It also ignores the fact that the FHWA based its decision to issue Mr. Kirkingburg a waiver on an individualized assessment of his qualifications.¹⁰ *See* 59 Fed. Reg. at 50890 (in discussing the original waiver program the FHWA explained that

¹⁰ The FHWA received 3,700 applications for vision waivers between March 25 and December 31, 1992 but only granted waivers to the 2,411 applicants which it determined were safe. *See* 59 Fed. Reg. at 50888-89.

"individualized determinations were made on the basis of complete data submitted by each applicant, to determine eligibility for participation in the waiver program."). Instead of accepting a FHWA vision waiver, Albertsons relied on a vision standard that the FHWA itself has recognized does not provide for an individual assessment. *See* 57 Fed. Reg. at 10295 (explaining that one purpose of the waiver program was to ultimately establish a "new vision standard that could embrace the concept of 'individual determination'"). Albertsons has provided no evidence that it has made an individual assessment. Albertsons has also failed to show that the actual abilities necessary to drive one of its CMVs differ from the requirements the FHWA imposes before issuing a CDL. Rather than identifying any unique functions of its own jobs, and rather than assessing Mr. Kirkingburg's own abilities, Albertsons simply resorted to "prejudice, stereotypes, or unfounded fear" about disabilities, *Arline*, 480 U.S. at 287, and therefore violated the ADA.¹¹

Essentially, Albertsons is seeking judicial review of the waiver program itself. However, if Albertsons had a legitimate argument with the FHWA's waiver program, the proper procedure would have been to challenge the rulemaking directly through administrative proceedings to "modify or repeal the rule itself." *Buck v. U.S. Dept. of*

¹¹ Albertsons suggests that a waiver of the vision standard is actually an "accommodation" of Mr. Kirkingburg's disability. Pet. Br. at 44-45. But Mr. Kirkingburg needs no accommodation to carry out the essential functions of driving a truck. The FHWA has already determined that he can perform those functions. Thus, the waiver is not an accommodation, but rather the revision of an otherwise discriminatory standard.

Trans., 56 F.3d 1406, 1409 (D.C. Cir. 1995) (stating that plaintiff's challenge of the DOT's refusal to grant waivers from the hearing requirement amounted to an impermissible "collateral attack upon the validity of the hearing requirement itself."); see also *Cousins v. Secretary of U.S. Dept. of Trans.*, 880 F.2d 603, 605 (1st Cir. 1989) (holding that driver seeking to challenge DOT physical qualifications standard must proceed according to the Administrative Procedure Act). Furthermore, judicial review of FHWA rules, regulations, and final orders cannot be properly sought in District Court as Albertsons has attempted to do. See 28 U.S.C. § 2342 (Hobbs Act) (stating that Court of Appeals is proper forum for judicial review of DOT rules, regulations, and final orders).

Even if these procedural defects could be overlooked, Albertsons has failed to provide the Court with "[i]nformation, views, arguments, delineating criteria, and statistical data" which support a repeal of the waiver program. See *Cousins*, 880 F.2d at 610. Albertsons has offered no evidence to undermine the FHWA's determination that Kirkingburg is a safe driver; the only support Albertsons does offer is its own assertion that the waiver program was "experimental." Pet. Br. at 44-45. However, the vision waiver program was experimental only insofar as its purpose was to ultimately reform the vision standard. The DOT had yet to determine a standard which could be universally applied without discriminating against safe drivers with visual disorders. The FHWA findings that the drivers who were issued waivers were safe was not experimental in any way. Waivers issued by the FHWA were based on each individual's proven ability to drive safely and the finding that the "level of safety for CMV

operation will remain unchanged as a result." 57 Fed. Reg. at 31459. In fact, the drivers who were granted waivers exceeded the safety ratings of the driving population as a whole. See 59 Fed. Reg. at 50890.

Nor can Albertsons rely on the D.C. Circuit's decision in *Advocates for Highway and Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994) to support its contention that the waiver program was experimental. The D.C. Circuit vacated the waiver program on August 2, 1994, over a year and a half after Albertsons fired Kirkingburg and then refused to accept his vision waiver. Even if Albertsons could invoke the *Advocates* decision as some sort of *post hoc* rationale for its decision, the FHWA's subsequent regulatory actions negate any defense that *Advocates* might have otherwise offered. The waiver program was vacated only because the FHWA failed to properly document its rationale for considering that vision waivers were consistent with the safe operation of CMVs; the D.C. Circuit's decision was not based on a finding that monocular drivers were unsafe. The court found that the FHWA had provided insufficient evidence in the record in its July 16, 1992 Notice of Final Disposition to support the issuance of vision waivers. See *id.* at 1293-94. After the ruling in *Advocates*, the FHWA quickly rectified its error by publishing additional findings which supported its original waiver determination. See 59 Fed. Reg. at 50889-90. The FHWA issued findings which demonstrated a correlation between safe driving history, the main criterion for receiving a waiver, and safe driving ability, the essential function of driving a CMV, based on studies conducted before the waiver program was implemented as well as data obtained during the

waiver program. *See* 59 Fed. Reg. 50887; 59 Fed. Reg. 59386. The FHWA then reinstated the waivers issued under the original waiver program, including that issued to Mr. Kirkingburg. *See* 59 Fed. Reg. 59386.

Finally, any suggestion that the waiver program was "experimental" or otherwise flawed was undercut by Congress' enactment of the Transportation Equity Act for the 21st Century, TEA-21. Pursuant to TEA-21, the DOT may grant renewable two year "exemptions" from minimum safety standards where "such exemption[s] would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption[s]." Pub. L. No. 105-178, Section 4007. The FHWA has continued to issue vision waivers pursuant to TEA-21 using requirements similar to those of the original waiver program. *See* Qualification of Drivers, Exemption Applications, 63 Fed. Reg. 66226 (Dec. 1, 1998) (Notice of Intent to Grant Applications). TEA-21 demonstrates that the FHWA's grant of waivers is not "experimental," but rather is an integral part of the regulatory procedure created by Congress. An employer such as Albertsons cannot ignore the results of that procedure in a way that discriminates against persons with disabilities.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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IN THE
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OCTOBER TERM, 1998

ALBERTSON'S, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

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QUESTION PRESENTED

Should the determination of whether the plaintiffs' monocular vision is a "disability" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A), be made without considering his use of mitigating measures of self-accommodations?

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42 U.S.C. §12182(b)(1)	5
42 U.S.C. §12201(a)	7
57 Fed. Reg. 31,458 (1992)	3

S. Rep. No. 101-116 (1989)	12, 13, 14
H.R. Rep. No. 101-485 (1990)	12, 14, 25

Federal Regulations:

28 C.F.R. pt. 35, App. A §35.104	16
29 C.F.R. pt. 1630, App. §1630.2(g)	10
29 C.F.R. pt. 1630, App. §1630.2(h)	15
29 C.F.R. pt. 1630, App. §1630.2(j)	16
45 C.F.R. §84.3(j)(2)(i)	8
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INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes.¹ NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law and civil rights issues. Some recent cases before this Court and other courts are: *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998); *Oncale v. Sundowner Offshore Services Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1997); *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 118 S.Ct. 1466 (1997); *Cleveland v. Policy Management Systems Corp.*, No. 97-1008, *cert. granted*, ___ U.S. ___, 67 U.S.L.W. 3228 (U.S. 10/5/98); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 958 (1997); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 748 (5th Cir. 1995); and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995).

NELA members have brought numerous cases under the Americans with Disabilities Act (ADA). NELA mem-

¹ The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. No persons other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

bers have also represented thousands of individuals in this country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect and defend the interests of employees involved in workplace disputes, including workers who are involved in ADA litigation.

This case presents an opportunity to clarify that the question of whether an individual has a "disability" should be made without considering the individual's use of mitigating measures such as medications, prosthetic devices and auxiliary aids. NELA submits this brief to urge the Court to conclude that the individual's use of mitigating measures should not be considered when determining whether the person has a substantial limitation of a major life activity.

STATEMENT OF THE CASE

Hallie Kirkingburg had been driving commercial trucks since 1979. He had an impeccable driving record. Albertson's hired him as a driver in 1990 in its distribution center in Portland, Oregon. Before he started working for Albertson's, he was examined by a physician who certified that his vision met the requirements established by the Department of Transportation's ("DOT") regulations. Albertson's transportation manager told Kirkingburg after the road test that "it is my considered opinion that this driver possesses superior driving skill to operate safely the type of commercial vehicles listed above." Kirkingburg was again examined by a physician and his vision was recertified after he had been in the job for several months.

The visual acuity in Kirkingburg's left eye is 20/200 and has been that way since birth. A visual acuity rating of 20/200 is well below what DOT regulations require. His poor vision in the left eye is caused by amblyopia, a condition which is commonly referred to as "lazy eye" which cannot be corrected. His right eye has a visual acuity rating of 20/20, with corrective lenses.

After a long-term absence of over a year caused by a non-driving, work-related injury, Kirkingburg was required in November, 1992 under the company's return to work policies to have his vision examined again to obtain recertification under DOT's standards. After accurately determining that Kirkingburg's vision in his left eye was 20/200, the examining physician refused to recertify him under DOT's regulations.

After he was denied certification, Kirkingburg applied for a waiver of the regular vision requirements under the Federal Highway Administration's ("FHWA") vision waiver program. To secure a waiver, the applicant must establish, among other things, that he has three years of recent experience driving a commercial vehicle without (1) license suspension or revocation, (2) involvement in a reportable accident in which the applicant received a citation for a moving violation and (3) more than two convictions for any other moving violations in a commercial vehicle. 57 Fed. Reg. 31,458 (1992). The applicant is also required to present proof from an optometrist certifying that his visual deficiency has not deteriorated since his last examination, that the vision in one eye is at least correctable to 20/40, and that he is "able to perform the driving tasks required to operate a commercial motor vehicle." *Id.* at 31,460.

Kirkingburg told Albertson's that he had applied for a waiver under the program. However, Albertson's fired him from his truck driver position, explaining that it would not accept a waiver, because of its policy of employing only drivers who "meet or exceed the minimum DOT standards." After Kirkingburg informed Albertson's several months later that he had obtained a vision waiver, Albertson's again would not accept it, and refused to reconsider his termination.

Kirkingburg filed suit against Albertson's under Title I of the Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.*, claiming that Albertson's discriminated against him because of his visual disability. The district court granted the employer's summary judgment motion, reasoning that Kirkingburg had failed to present a *prima facie* case. The Ninth Circuit reversed the decision and remanded the case to the district court, reasoning that Kirkingburg had presented uncontroverted evidence that due to the condition and permanence of his amblyopia, which rendered him almost totally blind in his left eye, he was substantially limited in the major life activity of seeing. *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1232 (9th Cir. 1998). Although Kirkingburg developed subconscious mechanisms to compensate for the detrimental effect his inability to see out of one eye had on his peripheral vision and depth perception, the court concluded that "the manner in which he sees differs significantly from the manner in which most people see." *Id.*

The Ninth Circuit also concluded that even if Kirkingburg was not disabled, he would still have a *prima facie* case under the ADA because the employer regarded him to be disabled. *Id.* The court reasoned that there

was a genuine issue of fact as to whether the employer regarded him to be disabled in light of evidence that one of Albertson's managers described Kirkingburg as "blind in one eye or legally blind." *Id.*

SUMMARY OF THE ARGUMENT

The ADA was adopted by Congress in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12182(b)(1). Many of those individuals with disabilities often use mitigating measures, such as medications, prosthetic devices or auxiliary aids to accommodate their disabilities.

The ADA is a remedial statute which must be construed broadly to effectuate its purpose. Some courts have narrowly interpreted the term "disability" by ruling that an individual's use of a mitigating measure should be taken into consideration when determining whether the individual is covered under the ADA. However, eight of the ten Circuit Courts of Appeals that have addressed the question have rejected that position. Compare *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998); *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1232-33 (4th Cir. 1998), *cert. granted*, ___ U.S. ___, No. 98-591, 1999 WL 5332 (U.S. Jan. 8, 1999); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857-65 (1st Cir. 1998); *Doane v. City of Omaha*, 1125

F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-23 (11th Cir. 1996); with *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, No. 97-1943, 1999 WL 5326 (U.S. Jan. 8, 1999); *Gilday v. Mecosta County*, 124 F.3d 760, 767, 768 (6th Cir. 1997).² Amicus asks this Court to embrace the views of the overwhelming number of courts that have broadly interpreted the statute to exclude consideration of mitigating measures.

The ADA's definition of disability is derived from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B). Courts interpreting the definition of "handicapped individual" under the Rehabilitation Act have routinely excluded consideration of mitigating measures. Both the ADA's legislative history and the Equal Employment Opportunity Commission's ("EEOC") Interpretive Guidance also state that mitigating measures should not be considered when determining whether an individual is substantially limited in a major life activity and therefore covered under the ADA. Interpreting the ADA to exclude consideration of mitigating measures is consistent with the statute's broad remedial purposes. Moreover, considering mitigating measures eliminates the first prong of the ADA's definition of disability, and is rele-

² In *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996), the Fifth Circuit stated in *dicta* that an individual's use of mitigating measures should be considered when determining whether the individual is substantially limited in a major life activity. *Id.* at 191-92 n. 3. However, the fifth Circuit abandoned that position in *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 n. 5 (5th Cir. 1998).

vant only to the "accommodation" side of the ADA mandate, rather than the "definition" side. Finally, the ADA should not be interpreted to discourage individuals from attempting to control their impairments, and visual impairments in particular should not be excluded from the ADA's coverage merely because the impairment can be easily mitigated.

ARGUMENT

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED WHEN DETERMINING WHETHER AN INDIVIDUAL HAS A DISABILITY UNDER THE FIRST PRONG OF THE ADA'S DEFINITION OF DISABILITY.

A. Mitigating Measures Were Not Considered Under the Rehabilitation Act.

The ADA defines the term "disability" as:

- (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (b) a record of such an impairment; or
- (c) being regarded as having such an impairment.

42 U.S.C. §12101(2). The ADA's definition of disability is derived "almost verbatim" from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B); *Bragdon v. Abbott*, 118 S.Ct. 2196, 2202 (1998). The ADA provides at 42 U.S.C. §12201(a) that:

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards used under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §790

et seq.) or the regulations issued by the Federal agencies pursuant to such title.

In *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), this Court interpreted that language to "require [] us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Id.* at 2202.

The Rehabilitation Act's regulations define "physical or mental impairment" as:

- (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
- (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. §84.3(j)(2)(i) (1997).

The Rehabilitation Act's regulations contain a representative list of "major life activities" and define the term to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. §84.3(j)(2)(ii) (1997). The list of major life activities "is illustrative, not exhaustive." *Bragdon*, 118 S.Ct. at 2205 (concluding that reproduction is a major life activity even though not specifically enumerated in the regulations).

This Court observed in *Bragdon* that "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Id.* at 2208 (citations omitted). Courts have never considered the use of mitigating measures when interpreting the definition of "handicapped" under the Rehabilitation Act and its regulations. Therefore, this Court should similarly exclude consideration of the use of mitigating measures when analyzing whether the individual is substantially limited in one or more major life activities.

In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), for example, the Ninth Circuit held that epilepsy was a handicap even though it was controlled by medication. *Id.* at 574. In *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991), the Second Circuit stated that "[w]e are inclined to view persons whose kidneys would cease to function without mechanical assistance, or whose kidneys do not function sufficiently to rid their bodies of waste matter without regular dialysis, as being substantially limited in their ability to care for themselves." *Id.* at 641. The First Circuit concluded in *Cook v. State of Rhode Island Dep't of Mental Health, Retardation and Hospitals*, 10 F.3d 17 (1st Cir. 1993), that an individual with morbid obesity had a handicap under the Rehabilitation Act, even though she could treat the manifestations of her dysfunctional metabolism through fasting or undereating. *Id.* at 24.

Although the plaintiff's diabetes, carpal tunnel syndrome and depression were controllable with medication, the court in *Miles v. General Services Administra-*

tion, 1995 WL 766013 (E.D. Pa. 1995), concluded that the plaintiff was handicapped within the meaning of the Rehabilitation Act. The court in *Liff v. Secretary of Transportation*, 1994 WL 579912 (D.D.C. 1994), rejected the defendant's argument that the plaintiff was not "handicapped" because her depression was controlled by medication, reasoning that "Congress intended that the determination of whether an impairment substantially limits a major life activity is to be made without regard to medication." The court relied, in part, on the language and purpose of the Rehabilitation Act in *Fal-lacaro v. Richardson*, 964 F.Supp. 87 (D.D.C. 1997), for its conclusion that a person who was totally blind was handicapped under the statute, even though she had 20/20 vision with corrective lenses.³

In *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), cert. denied, 513 U.S. 1152 (1995), the Tenth Circuit observed that "Congress intended that the relevant case law developed under the Rehabilitation Act be generally be applicable to the term 'disability' under the ADA." *Id.* at 897 (citing 29 C.F.R. pt. 1630, App. §1630.2(g)). This Court should reject the Tenth Circuit's attempt in the instant case to disregard its own admonition and construe the ADA's definition of

³ See also, e.g., *Strathie v. Dep't of Transportation*, 716 F.2d 227, 228-29 (3d Cir. 1983) (undisputed that individual with a hearing impairment was handicapped under the Rehabilitation Act even though with the use of a hearing aid his hearing was corrected to an acceptable level under relevant state law); *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 621-22 (9th Cir. 1982) (accepting without discussion that individual with insulin-dependent diabetes was handicapped under the Rehabilitation Act).

disability more narrowly than the Rehabilitation Act's definition of the term of "handicap." Because the Rehabilitation Act's definition of "handicap" did not require that mitigating measures be considered, repeating the same definition of "disability" under the ADA clarified that Congress intended to incorporate that interpretation into the ADA as well.

B. The ADA's Legislative History Demonstrates that Mitigating Measures Should Not Be Considered When Determining Whether an Individual Has a Disability.

The starting point for interpreting a statute "is the language of the statute itself." *Arnold v. United Parcel Service*, 136 F.3d 854, 857 (1st Cir. 1998) (citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)). Most courts that have examined the question have concluded that the ADA does not clearly state whether mitigating measures should be considered when examining whether an individual has a substantial impairment of one or more major life activities. See, e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 467 (5th Cir. 1998); *Arnold v. United Parcel Service*, 136 F.3d 854, 859 (1st Cir. 1998) ("A reasonable person could interpret the plain statutory language to require an evaluation either before or after ameliorative treatment."); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

If a statute's text is not absolutely clear, the next source for guidance to ascertain the statute's meaning is its legislative history. *Arnold*, 136 F.3d at 858. The ADA's legislative history plainly demonstrates that

mitigating measures should not be considered when determining whether an individual has a substantial impairment of one or more major life activities.

In describing the first prong of the definition of disability, the House Judiciary Committee Report states that:

The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment are controllable by medication. H.R. Rep. No. 101-485 (III) at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").

Similarly, the House's Education and Labor Committee Report provides that:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication. H.R. Rep. No. 101-485 (II) at 42 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 ("House Labor Report").

The Senate Report also provides that determining whether a person has a disability under the ADA

"should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 101-116 at 23 (1989) ("Senate Report").

The Senate Report does contain language which some courts have interpreted to be inconsistent with the position that the question of whether a condition is covered under the "first prong" of the definition of disability excludes consideration of mitigating measures.⁴ See, e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998). While discussing the third prong of the definition of disability, the Senate Report states that:

Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

Senate Report at 24.

In *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998), the First Circuit concluded that these

⁴ The "first prong" of the definition of disability refers to whether the individual has a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. §12102(2)(A). The "third prong" of the definition of disability refers to someone who does not have a "disability" under the first prong of the definition but is "regarded" by the employer as having such an impairment. 42 U.S.C. §12102(2)(C).

two passages from the Senate Report were not inconsistent, reasoning that "these passages can be easily squared by recognizing that an individual could have a 'disability' under both prong one (having an impairment that substantially limits a major life activity) and prong three ('regarded as' having such an impairment) at the same time; one does not preclude the other." *Id.* at 860 (emphasis in original). Moreover, the House Reports, which came after the Senate Report, did not incorporate the Senate Report's discussion of medicated conditions under the third prong of the definition of disability. That omission led the Fifth Circuit to conclude that:

Given that much of the structure and language of the House Report was borrowed from the Senate Report, it seems that the House Committees were aware of how the Senate Report dealt with the mitigating measures issue and consciously changed the language of the Reports.

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 468 (5th Cir. 1998).⁵

⁵ The Fifth Circuit also observed that "... the Senate Bill that was ultimately passed was amended to contain much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed." *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998).

C. The EEOC's Interpretive Guidance Also States that Mitigating Measures Should Not Be Considered When Determining Whether an Impairment Substantially Limits a Major Life Activity.

If the plain language and legislative history do not clarify the statute's meaning, a court must defer to the interpretation of the agency charged with enforcing the statute, provided the interpretation "flows rationally from a permissible construction of the statute." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (citations omitted). The ADA authorized the EEOC to issue regulations to enforce the statute. 42 U.S.C. §12116 (1994). The EEOC exercised that authority by promulgating regulations and attaching to those regulations guidelines for interpreting the ADA. *Id.* at 863. Although the EEOC's interpretive guidelines are not, like regulations, controlling, they "constitute a body of experience and informed judgment to which courts and litigants may properly result for guidance." *Bragdon v. Abbott*, 118 S.Ct. 2196, 2207 (1998) (citation omitted).⁶

In its Interpretive Guidance, the EEOC states that the existence of an impairment must be determined "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630 App. §1630.2(h). The guidelines later elaborate that the "determination of whether an individual is substantially limited in a major life activity" must be

⁶ In *Bragdon*, this Court looked to the EEOC's pronouncements for guidance in concluding that an individual's asymptomatic HIV disease was a substantial limitation of the major life activity of reproduction. *Id.* at 2209.

made "without regard to mitigating measures such as medicines or assistive or prosthetic devices." 29 C.F.R. pt. 1630 App. §1630.2(j).⁷ The EEOC's Interpretive Guidance also provides that:

An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

29 C.F.R. pt. 1630, App. §1630.2(j).

This Court has held that an agency's interpretation of a statute it administers "should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise." *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984)). There is no conflict between the EEOC's interpretive guidance and either the statute or its legislative history. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996). Rather, "[t]he EEOC's interpretation

⁷ The United States Department of Justice ("DOJ"), which enforces the ADA's prohibition of disability discrimination in employment in state and local government entities, has also stated that "disability should be assessed without regard to the availability of mitigating measures." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998) (quoting 28 C.F.R. Part 35, App. A §35.104).

is not merely 'permissible;' it is entirely consistent with the ADA's legislative history and broad remedial purposes." *Arnold*, 136 F.3d at 864.

D. Interpreting the First Prong of the ADA's Definition of Disability to Exclude Consideration of Mitigating Measures Is Consistent with the Statute's Broad Remedial Purpose.

When construing a statute, a court must "interpret the words of [the statute] in light of the purposes Congress sought to serve." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (citations omitted). The ADA is a "broad remedial statute." *Penny v. United Parcel Service, Inc.*, 128 F.3d 408, 414 (6th Cir. 1997). Remedial legislation like the ADA "should be construed broadly to effectuate its purpose." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998); see also *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) (observing that the Federal Rehabilitation Act and its regulations should be interpreted broadly).

In the employment discrimination arena, the ADA's fundamental purpose is "to protect individuals who have an underlying medical condition or other limiting impairment, but who are in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (emphasis in original) (citations omitted). In *Arnold*, the First Circuit concluded that "[c]onceptually, it seems more consistent with Congress' broad remedial goals, and it also makes more sense, to

interpret the words 'individual with a disability' more broadly, so the Act's coverage protects more types of people against discrimination." 136 F.3d at 861.⁸ The Ninth Circuit reached the same conclusion, in the instant case, reasoning that the ADA "was drafted in broad language in order to protect a large class of physically impaired individuals from unwanted discrimination—it was not drafted narrowly to protect only those with the most severe disabilities." *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1233 (9th Cir. 1998), *cert. granted*, ___ U.S. ___, No. 98-591, 1999 WL 5332 (1999). Employers are not jeopardized by a broad interpretation of the term "disability" because individuals seeking protection under the statute must still be "qualified" to perform the essential functions of the job. 42 U.S.C. §§12111(8), 12112(a) (1994); see *Kirkingburg*, 143 F.3d at 1233; *Arnold*, 136 F.3d at 861-62.

This Court should also reject the argument that if mitigating measures are not considered, the definition of "disability" becomes so broad, so all-encompassing, that the concept itself becomes nearly meaningless—that is, it becomes a condition that affects simply too many American employees. Quite simply, sheer numbers of protected individuals have never been critical for either Congress or this Court when interpreting a civil rights statute. Title VII's prohibition against race discrimination protects all employees—millions and mil-

⁸ The *Arnold* court's interpretation mirrors this Court's observation in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) that when interpreting the definition of "handicap" under the Federal Rehabilitation Act "a broad definition, one not limited to the so-called 'traditional handicaps,' is inherent in the statutory definition." *Id.* at 280 n. 5.

lions of workers—and its prohibition against sex discrimination protects all men and all women, provided their employers employ 15 or more full-time workers. The Equal Pay Act and the ADEA protect untold millions of workers. The Reconstruction Civil Rights Amendments protect all of us. When viewed against the broad sweep of other civil rights legislation, the so-called "meaningless" argument itself becomes meaningless and illogical.

E. Considering Mitigating Measures Eliminates the First Prong of the ADA's Definition of Disability.

Considering mitigating measures and devices to evaluate if an individual is disabled under the ADA will lead to an absurd result: it will ultimately render the first prong of the definition of "disability" meaningless. Today, because of advancements in medicine and science, a great many medical conditions and impairments are controlled by medication, therapy, surgery, medical devices or other ameliorative measures. For example, persons with diabetes dependent on insulin are able to keep the effects of their condition under control with the administration of insulin. Persons with hearing loss ameliorate their condition with a hearing aid. The examples are countless. There are, however, medical conditions for which medicine and science have yet to develop controlling devices. There is no known measure that controls the debilitating effects of Amyotrophic Lateral Sclerosis (ALS, or otherwise known as Lou Gehrig's Disease). While treatments for AIDS may slow down the progression of the disease, there is not yet any measure that completely eliminates its impair-

ing effects. Adopting a rule that determines whether a condition is a "disability" under the first prong of the ADA reduces the statute to a protection for only a select group of persons—those suffering from impairing conditions for which there exist no mitigating measures. Persons with conditions for which mitigating measures are available are left unprotected, and the first prong of the definition ceases to exist for them. Congress did not intend to protect one class of persons over the other.

More importantly, medical science undoubtedly will continue to advance, developing and discovering new ameliorative devices for medical conditions for which there currently exist no controls. Medical conditions without mitigating controls will become fewer and fewer. As the advancements are made, and as long as mitigating measures are considered, more and more persons will be left unprotected by the ADA. Ultimately, medicine, science and technology will render the first prong of the definition meaningless and nonexistent. Congress certainly did not intend such a result.

F. Mitigating Measures Are Relevant to the "Accommodation" Side of the ADA Mandate, Not the "Definition" Side.

The fallacy in the argument that mitigating measures rule out a physical or mental condition from being defined as a disability worthy of ADA protection is not that such measures are unimportant—they truly are—but that their importance lies in determining the employer's obligation to "accommodate" rather than in determining whether an individual is "disabled." In broad terms, the ADA requires an employer to provide a rea-

sonable "accommodation" to a disabled worker. Mitigating measures are critically important when carrying out this mandate. An employer which permits employees to wear eyeglasses to read or operate machinery provides a minimal accommodation to those workers' impairing condition—in fact, that effort is so commonsensical, so basic, so minimal, so utterly reasonable that we normally don't even think of it as an "accommodation" within the meaning of the statute, but that is what it really is. By contrast, an employer clearly violates the ADA if it has an across-the-board policy forbidding retention of anyone (regardless of their actual job duties) who, say, wore glasses or took prescription drugs because such a policy would not provide the individualized accommodation necessitated by the ADA. "Mitigating measures" therefore are relevant when assessing whether an employer has adhered to the ADA's "accommodation" requirement, but they are not relevant to assessing whether the Act's "definition" of a disability has been met.

II. THE ADA SHOULD NOT BE INTERPRETED IN A MANNER THAT WOULD DISCOURAGE INDIVIDUALS FROM ATTEMPTING TO CONTROL THEIR IMPAIRMENTS.

In *Arnold v. United Parcel Service*, 136 F.3d 854 (1st Cir. 1998), the court stated that concluding that Arnold's diabetes was not covered under the prong of the ADA's definition of disability would provide him with a disincentive to controlling his impairment, reasoning that:

UPS's interpretation could very well produce results antithetical to its expressed concerns and to the

Act's attempt to take such concerns into account that a person with a disability is able to use medical knowledge and technology to overcome many of the effects of his illness (in Arnold's case, by a continuing regimen of medicine, proper eating habits and rest) may mean that he will, in practice, rarely require any sort of accommodation from his employer; but his achievement should not leave him subject to discrimination because of his underlying disability. He should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self help.

Arnold, 136 F.3d at 863 n. 7.

Endorsing the Tenth Circuit's position on mitigating measures would not merely deter individuals from taking advantage of medical knowledge and technology. Rather, it would also deter individuals from developing "self-accommodations" for their impairment. In *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998), for example, the court held that a police officer, blinded in one eye, was disabled under the first prong of the ADA's definition of disability even though he had developed "subconscious adjustments" which enabled him to compensate for his limitations. *Id.* at 627. According to the Eighth Circuit, Doane's "brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments

should not take him outside the protective provisions of the ADA." *Id.* at 627-28. Similarly, the plaintiff in *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998), had a learning and reading impairment which significantly restricted her ability to timely identify and decipher the written word. *Id.* at 329. Dr. Bartlett developed "self-accommodations" which improved her ability to spell and her performance on word identity and work attack tests. *Id.* at 326. The Second Circuit concluded that "[h]er history of self-accommodations, while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population 'do not take [her] outside the protective provisions of the ADA.'" *Id.* at 329 (quoting *Doane*).

An individual who elects not to use an available mitigating measure because it would result in exclusion from the ADA's coverage is still placed in a precarious position because they may no longer be a "qualified" individual with a disability, 42 U.S.C. §12112(8), as defined by the ADA. In *Siefkin v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), for example, the defendant hired Siefkin, an individual with diabetes, as a probationary police officer, believing that he "could monitor his medical condition sufficiently to allow him to perform the duties of a police officer." *Id.* at 666. However, he failed to monitor his diabetes properly on one occasion and suffered a diabetic reaction while on duty driving a patrol car. *Id.* at 665. The employer terminated him and refused to give him a second chance to show that he could control his diabetes. *Id.* at 665, 666-67. The Seventh Circuit upheld the district court's dismissal of the case for failure to state a claim, reason-

ing that the plaintiff was fired because he failed to control a controllable disease. The Eighth Circuit reached the same conclusion in *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998). Despite Burrough's assurance that he could keep his diabetes under control, he twice suffered a severe diabetic episode due to poor timing of his meals and activities which rendered him unable to perform his job as a police officer. The Eighth Circuit, relying on *Siefkin*, upheld the District Court's dismissal of his ADA claim, reasoning that it was legitimate for the city to expect and require its patrol officers to be functional and alert at all times while on duty. *Id.* at 507. As the facts in both *Siefkin* and *Burroughs* illustrate, interpreting the ADA in a manner that discourages individuals from controlling their impairments could also jeopardize public safety.

III. INDIVIDUALS WITH VISUAL IMPAIRMENTS SHOULD NOT BE EXCLUDED FROM THE ADA'S COVERAGE MERELY BECAUSE THE IMPAIRMENT CAN BE EASILY MITIGATED.

The courts which have concluded that individuals with corrected vision of 20/20 are not covered under the first prong of the ADA's definition of disability have focused on the relative ease of mitigating a visual impairment. In *Sutton v. United Air Lines*, 130 F.3d 893 (10th Cir. 1998), *cert. granted*, No. 97-1992, 1999 WL 5326 (U.S. Jan. 8, 1999), for example, the Tenth Circuit reasoned that "[p]laintiffs merely don their eyeglasses (or contact lenses) and go about all their normal daily activities in the same or similar condition, manner or duration as the average person in the general population." *Id.* at 903. However, there is nothing in

either the ADA's legislative history or the EEOC Regulations and Interpretive Guidance which provides that certain impairments should not be covered under the first prong of the definition of disability, if the mitigating measures for treating the impairment are either easy to use or common. In fact, the House Labor Report specifically identified another relatively common mitigating measure of a hearing aid, stating that "a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid." H.R. Rep. No. 101-485(1), at 42 (1990), *reprinted* in 1990 U.S.C.C.A.N. 334. There is no reason to distinguish between a visual impairment corrected through the use of eyewear and a hearing impairment corrected through the use of a hearing aid. See *Wilson v. Pennsylvania State Police Dep't*, 964 F.Supp. 898, 906 & n. 9 (E.D. Pa. 1997) (analogizing eyeglasses to hearing aids and observing that "[d]efendants would be hard pressed to argue that eyeglasses and contact lenses are not 'mitigating measures.'").

In an uncorrected state, individuals with visual impairments may be substantially limited in several major life activities. See, e.g., *Wilson*, 964 F.Supp. at 907 (without corrective eyewear, plaintiff's vision was blurred and unfocused and substantially limited him in several daily activities which involved seeing, such as driving, cooking, reading and caring for his infant son); *Peacock v. County of Marin*, 953 F.Supp. 306, 309 (N.D. Cal. 1997) (without corrective lenses, plaintiff would be severely limited in seeing, learning, caring for himself, participating in community activities and walking); *Sicard v. City of Sioux City*, 950 F.Supp. 1420, 1439

(N.D. Iowa 1996) (without corrective lenses, plaintiff could not read, drive an automobile, read street signs, watch television or movies, walk in unfamiliar surroundings or perform any of the duties of the firefighter position he sought). The Tenth Circuit's analysis of the issue ultimately fails because it confuses the impairment with its treatment. See *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

In *Fallacaro v. Richardson*, 965 F.Supp. 87 (D.D.C. 1997), the court rejected the argument that an individual who was legally blind without corrective lenses but had 20/20 vision with contact lenses was not disabled within the meaning of the Rehabilitation Act, reasoning that "[n]either as a matter of law nor common sense would we say that they are not impaired or disabled because their prosthetic device happens to be exceptionally good." *Id.* at 93. According to the *Fallacaro* court, "[i]t makes little sense to deprive an entire class of disabled individuals—the legally blind who have correctable vision—of the protections of the Act merely because it is so easy to accommodate their disability." *Id.* The *Fallacaro* court's observation is equally applicable where, as here, the mitigating measure relied upon to improve one's vision is the subconscious mechanisms developed to cope with the visual impairment.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC.,

Petitioner,

—v.—

HALLIE KIRKINGBURG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF JUSTICE FOR ALL; AARP; AIDS POLICY
CENTER FOR CHILDREN, YOUTH & FAMILIES; ALLIANCE
FOR REHABILITATION COUNSELING; AMERICAN
ASSOCIATION ON MENTAL RETARDATION; AMERICAN
MEDICAL STUDENT ASSOCIATION; ARC OF THE UNITED
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ET AL; AS AMICI CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF THE AMICI CURIAE¹

This *amici curiae* brief is submitted on behalf of Justice for All; AARP, AIDS Policy Center for Children, Youth and Families; Alliance for Rehabilitation Counseling; American Association on Mental Retardation; American Medical Student Association; Arc of the United States; Brain Injury Association, Inc.; Center for Women Policy Studies; Committee For Children; Disabled in Action of Metropolitan New York; Employment Law Center; Epilepsy Foundation of America; Gay and Lesbian Advocates and Defenders; Lambda Legal Defense and Education Fund, Inc.; Legal Action Center; National Association of People With AIDS; National Association of Protection and Advocacy Systems; New York Lawyers for the Public Interest; Self Help for Hard of Hearing People; Title II Community AIDS National Network; and Union of American Hebrew Congregations. The statements of interest of *amici* are included in the appendix to this brief.

By written consent of the parties,² *amici curiae* submit this brief in support of Respondent Hallie Kirkingburg.

SUMMARY OF ARGUMENT

The issues in this case concern whether the ADA will serve Congress' intent as a viable tool for dismantling systemic discrimination in a society in which disability, rather than actual ability, is the frequent focus of determining employability. Congress intended that the ADA protect a

¹ This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

² Letters of consent from all parties have been filed separately with the Clerk of the Court.

broadly-defined group of individuals with disabilities from discrimination, understanding as it did that it would have to battle attitudinal barriers as well as physical barriers which routinely confront and frustrate individuals with disabilities who wish to work.

Adoption of Petitioner Albertsons' analysis, that one can be too impaired to perform a job but not sufficiently impaired to merit ADA protection, would negate the statute's mandate against discrimination for the majority of individuals with disabilities who are able to work.

Moreover, nothing in the ADA dictates that in cases involving impairments which are objectively and predictably limiting of some major life activity, a plaintiff must nonetheless introduce individualized evidence of the impairment's impact on his or her particular major life activities. Inserting such a requirement into the Act in cases in which a reasonable person would expect that an individual's impairment would substantially limit major life activities would require both plaintiffs and defendants to engage in expensive fact-finding that is unnecessary for addressing the merits of the discrimination claim. In Kirkingburg's case, his monocular vision undisputedly and profoundly affects the manner and ease with which he sees and a host of major life activities related to seeing.

With § 12101(2)(C) of the ADA, Congress intended to protect people from a range of discriminatory conduct and reactions motivated by myths, fears and stereotypes about disabilities which are common even when a person does not have a substantially limiting impairment. This protection for persons "regarded as" disabled is necessary to address a major form of discrimination involving the classifying and labeling of individuals perceived as disabled, without regard to their real abilities to do what a job actually requires. Albertsons' characterization of physical requirements that are not

necessary for the hiring of safe and skilled drivers as "an essential job function" constitutes a paradigmatic example of conduct which violates the "regarded as" definition of disability.

ARGUMENT

I. CONGRESS DEFINED DISABILITY IN THE ADA TO ENSURE THAT INDIVIDUALS WHO ARE CAPABLE OF WORKING ARE NOT PRECLUDED FROM DOING SO BECAUSE OF DISCRIMINATION AGAINST THEM BASED ON A WIDE RANGE OF IMPAIRMENTS.

A. The History And Purpose Of The ADA's Definition Of Disability.

The term "disability" in the ADA means, "with respect to an individual":

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment;

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

This definition was not a new creation. As the Court recognized just last term, this definition derived from the definition of handicap added to the Rehabilitation Act in 1974, and the legislative and regulatory history of that amendment is relevant to the interpretation of the ADA. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998); 42 U.S.C. §

12201(a).³ In amending the Rehabilitation Act, Congress discarded a narrow, technical definition directed towards individuals who needed rehabilitation services⁴ in order to be employable in favor of a three-pronged definition of "handicapped individual" that applies to individuals who can work without the benefit of vocational services but nevertheless experience discrimination. See Pub. L. No. 93-516, § 111, 88 Stat. 1617, 1619 (1974) (codified at 29 U.S.C. § 706(8)(B) (1998)).

The first prong of the amended definition contains broad language flexible enough to reach a wide range of health problems (i.e., "physical or mental impairment which substantially limits . . . major life activities"). See 88 Stat. 1617, 1619 (1974). Congress included the second and third prongs to address discrimination arising from stereotypes and ignorance about physical and mental impairments. *Id.* See also, S. Rep. No. 1297, at 16, 37-38, 50 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6388-91, 6413-6414.

In promulgating regulations under the Rehabilitation Act, the Department of Health and Human Services ("DHHS") found that a "broad" definition, one not limited to

³ See also, e.g., *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993), cert. denied, 511 U.S. 1011 (1994) ("The ADA defines a disability in substantially the same terms as the [Rehabilitation] Act defines an individual with handicaps."); *McCullough v. Branch Banking & Trust Co.*, 35 F.3d 127, 131 (4th Cir. 1994), cert. denied, 513 U.S. 1151 (1995) ("The federal policies behind the ADA and the Rehabilitation Act are similar.").

⁴ The Rehabilitation Act of 1973 defined "handicapped individual" to mean: "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services." Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973).

"traditional handicaps," was inherent in the statutory definition. See 45 C.F.R. § 84, App. A, at 310 (1985). This court agreed in *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 280 n.5, 283-284 (1987) (endorsing DHHS' commentary, and observing that this flexible definition of "handicap" was also intended to protect individuals who may not have any diminished physical capability, but who are substantially limited solely because of the negative attitudes of others towards their impairments). One year after the Court's decision in *Arline*, Congress used the identical, broad definition of "handicap" in the Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620 (1988), and endorsed the DHHS regulations.⁵

Congress enacted the ADA in 1990 to extend the prohibition against discrimination on the basis of disability to private employers and public accommodations.⁶ In so doing, Congress adopted the Rehabilitation Act's definition of "handicap," and, as this Court noted recently, mandated that courts "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Bragdon*, 118 S. Ct. at 2202 (1998); 42 U.S.C. § 12201(a).⁷

⁵ See H.R. Rep. No. 100-711, 22, reprinted at 1988 U.S.C.C.A.N. 2173, 2183 (1988) (citing 45 C.F.R. § 84, App. A and noting that the committee intended that the definition of handicap be interpreted consistent with regulations clarifying the definition of handicap in the Rehabilitation Act).

⁶ Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101 et seq. (1998)).

⁷ By the time Congress passed the ADA, courts had provided protection against discrimination under the Rehabilitation Act and the Fair Housing Act to individuals with a wide variety of impairments. See e.g., *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990), cert. denied, 499

The ADA provides a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (1994). Congress adopted the Rehabilitation Act's broad, three-pronged definition of "handicap" in order to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with impairments which are not so debilitating as to preclude working and the enjoyment of public accommodations. See 42 U.S.C. § 12101(a)(8).⁸ As the First Circuit observed, the purpose of the ADA in the employment context is "essentially to protect individuals who have an underlying medical

U.S. 904 (1991) (noting that "it is well established that infection with AIDS constitutes a handicap" under the Rehabilitation Act); *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720, 725-728 (S.D. Ill. 1989) (HIV-positive persons are covered under the Fair Housing Act); *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) (plaintiff with epilepsy is person with disability under § 504); *Fynes v. Weinberger*, 677 F. Supp. 315, 321 (E.D. Pa. 1985) (plaintiff with asbestosis is person with disability under § 504); *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) (insulin-dependent diabetic is person with disability under § 504); *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1376 (10th Cir. 1981) (plaintiff with multiple sclerosis is person with disability under § 504); *Gilbert v. Frank*, 949 F.2d 637 (2nd Cir. 1991) (individual with kidney disease requiring regular dialysis has a disability under the Rehabilitation Act); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (person with seizure disorder); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989), *cert. denied*, 493 U.S. 892 (1989) (individual with asymptomatic hepatitis B).

⁸ See also 42 U.S.C. § 12101(a)(2) (Congress found that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem."); H.R. Rep. No. 485, pt. 2, 101st Cong., 2nd Sess. at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 (Individuals with disabilities have been subject to discrimination based on "and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society.").

condition or other limiting impairment, but who are in fact capable of doing the job." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998).

Congress understood that discrimination against such individuals impedes economic self-sufficiency and creates dependence on social welfare programs. See 42 U.S.C. § 12101(a)(9) ("[D]iscrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.").⁹ Thus, to promote independence, the statutory text covers a wide range of congenital and acquired conditions which fall outside the general public's common understanding of the term "disability."

The ADA must be construed in light of its purpose as a nondiscrimination statute rather than a benefits entitlement statute.¹⁰ Consistent with the structure and purpose of federal antidiscrimination statutes, prohibited classifications under the ADA should be construed broadly. In cases dealing with discrimination on the basis of race or gender, see Title VII, 42 U.S.C. § 2000e *et seq.*, for example, the critical issue is not whether the plaintiff is within the protected class by

⁹ See also S. Rep. No. 101-116, 116-117 ("The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency and social welfare programs that cost the taxpayers unnecessary billions of dollars each year.").

¹⁰ In contrast to the broad definition of disability in the ADA, Congress defined the term disability in the Social Security Act as "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A).

employing a prohibited classification without a sufficient basis for doing so, but whether the defendant discriminated.

In an ADA Title I case, a plaintiff must prove, in addition to discrimination, that he or she is qualified for the job in question. Consequently, the fact that the class of protected individuals is broadly defined does not imply that the plaintiff can readily prevail. Rather, it simply means that the Act's nondiscrimination mandate should apply generally to those qualified individuals who can demonstrate discrimination due to the congenital or acquired health condition at issue.¹¹

The goals of the ADA require that the group classified as "disabled" be broad and that the merit of claims then be determined by an assessment of whether the individual has been discriminated against within the meaning of the statute and is "qualified" for the job. As this Court noted in *Arline*, the fundamental premise of the Rehabilitation Act, upon which the ADA is based, is to replace "myths and fears" about impairments with "actions based on reasoned and medically sound judgments." *Arline*, 480 U.S. at 284-85. If courts apply an overly restrictive approach to defining who can meet the statute's definition of "disabled," employers and public accommodations would be able to act based on myths and stereotypes — the very problem that the ADA is intended to eradicate. See 42 U.S.C. § 12101(a)(7) (noting pernicious effects of "stereotypic assumptions" about individuals with disabilities). An overly restricted reading of the statute, such

¹¹ The breadth of the definition of disability is balanced by additional limiting or restricting principles. For example, individuals with disabilities are entitled to a "reasonable accommodation" only when it does not impose an undue hardship, 42 U.S.C. § 12112(b)(5)(A), or fundamental alteration of services, 42 U.S.C. § 12182(b)(2)(A)(ii). Discrimination also is permitted if the disability creates a "direct threat to the health or safety of others." 42 U.S.C. §§ 12113(b) and 12182(b)(3).

as that suggested by Petitioner, also would produce the absurd result that individuals who are less than fully incapacitated by their serious impairments are unprotected from discrimination because they are not "disabled," while only those whose impairments are so incapacitating that they are not qualified for work are covered under the Act. In such a world, no one has a claim under the ADA and a statute designed to promote equal opportunity and independence is reduced to a meaningless platitude.

B. The Term "Substantially Limits" In The Definition Of Disability Must Be Interpreted To Apply To The Impairments Of Individuals Who Have Some Congenital Or Acquired Health-Based Limitation That Is Not Incapacitating.

Under the first prong of the definition of disability, a physical impairment constitutes a disability if it "substantially limits" a major life activity. 42 U.S.C. § 12102(2)(A). The phrase "substantially limits" must be construed in light of the ADA's purpose to eradicate discrimination against individuals with physical or mental impairments which are not so debilitating or incapacitating that the person is unable to work. Congress' choice of the words "substantially limits" plainly rejects any requirement that an individual be completely unable to engage in a particular life activity in order to be considered disabled. See *Bragdon*, 118 S. Ct. at 2206 (observing that the "substantially limits" test can be met even if the difficulties resulting from the limitation are not "insurmountable").

Petitioner misses the entire point of the ADA by arguing that Kirkingburg cannot be substantially limited in seeing because he can "otherwise perform normal daily activities requiring eyesight," and "has a long history of

employment." See Petitioner's Brief at 22-23.¹² The fundamental premise of the ADA is that there are individuals with disabilities (e.g., individuals who are substantially limited in major life activities, such as those related to seeing) who, in fact, are fully capable of performing the same activities, including work, as individuals without disabilities.

The statute does not define the term "substantially limits." Importantly, however, the statutory language does not require that the impairment limit the major life activity in any particular way. The Equal Employment Opportunity Commission's (EEOC) regulations¹³ reflect this and the conclusion that it is *how* an individual accomplishes a task or activity, rather than *whether* the individual can accomplish the activity, that determines a substantial limitation. The regulations provide that:

The term substantially limits means:

...

(ii) Significantly restricted as to the condition, *manner* or duration under which an individual can perform a particular major life activity as compared to the condition, *manner* or duration under which the average person in the general population can perform that same major life activity.

¹² Petitioner Albertsons asserts that "Kirkingburg's long and consistent job history demonstrates he is not substantially limited in the major life activity of seeing." Petitioner's Brief at 15. This brand of analysis would force the conclusion that Helen Keller was not disabled or entitled to the protection of disability nondiscrimination laws.

¹³ Congress authorized the EEOC to issue regulations to implement I of the ADA. See 42 U.S.C. § 12116.

29 C.F.R. § 1630.2(j)(1) (emphasis added).¹⁴ These regulations are entitled to deference. See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (if statute is silent or ambiguous, deference due if agency's construction is "permissible" or "reasonable" reading, and does not conflict with clearly expressed Congressional intent). See also *Bragdon*, 118 S. Ct. at 2209 (granting *Chevron* deference to views of agency directed by Congress to issue implementing regulations, technical assistance and to enforce ADA).

A significant restriction in the "manner" of performing a major life activity concerns the mode or difficulty of performing the activity, not whether the individual can achieve an equivalent result as an individual without that impairment. Consistent with the statute's language and purpose, the regulation requires a common sense determination of the relative significance of an impairment, not a finding of significant incapacitation or functional limitation.¹⁵ For example, a person who has had a laryngectomy and speaks with a voice box still performs the major life activity of speaking. Such a person may perform

¹⁴ These regulations are consistent with the ADA's legislative history. See S. Rep. No. 116, 101st Cong., 1st Sess. at 23; H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. at 52 ("A person is considered an individual with a disability for purposes of the first prong of the definition when an individual's important life activities are restricted as to the conditions, manner or duration under which they can be performed in comparison to most people.").

¹⁵ This Court in *Arline* recognized that the "substantial limitation" requirement was not intended to be overly exacting. The *Arline* Court quickly and easily determined that the plaintiff was substantially limited in a major life activity simply because she had been hospitalized on one occasion, without need for any further inquiry. See 480 U.S. at 281.

"normal daily activities requiring [speech]" and may have a "long history of holding employment positions requiring the use of [speech]." See Petitioner's Brief at 22-23. An individual with a voice box, however, is significantly restricted in the manner in which he or she can speak as compared to a person in the general population, as well as in a host of other activities that involve speech, such as interacting with others. Similarly, a person with prosthetic limbs may walk and run, but does so with significantly greater difficulty than a person who does not rely on prostheses. Clearly, the fact that a person who has lost limbs can walk and run does not alter that she is significantly restricted in these and other major life activities. Most importantly, her ability to run does not render an employer's disinclination to hire her any less discriminatory.

The U.S. Civil Rights Commission illustrated this "spectrum of abilities" principle through an examination of the function of sight:

The simplistic categorization of "blind" and "sighted" . . . actually covers infinite gradations and variations of the ability to see. Vision is not one-dimensional, but rather involves a number of component functions, such as seeing at a distance, distinguishing colors, focusing on nearby objects, seeing in bright light, seeing in shade or darkness, seeing to the side and so on. For each such visual function there is a range of abilities. For example, at one end of the visual acuity spectrum are the few people with unusually sharp eyesight — those who can read finer print than that on the bottom of a doctor's eye chart. At the other end are the tiny proportion with no vision whatsoever. The vast majority of people fall somewhere between these two extremes. A similar continuum occurs in other component functions of the ability to see. . . .

This simple concept's relevance to discrimination lies in the frequency with which it is ignored. Instead of discerning the range of individual abilities, society categorizes people as either blind or sighted . . . either handicapped or normal.

Robert L. Burgdorf, Jr., *"Substantially Limited" Protection From Disability: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 519-522 (1997) (hereinafter "Burgdorf, 'Substantially Limited' Protection") (citing U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983)).

The Ninth Circuit correctly found that Kirkingburg has an impairment that limits his peripheral vision and depth perception and is significantly restricted in the manner in which he sees as compared to most people. See *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1231 (1998). See also Respondent Kirkingburg's Brief, Argument § I.A.(3) (describing the permanent and uncorrectable limitations and restrictions in the manner of seeing and the lowered visual acuity in every person with amblyopia).¹⁶ Under controlling regulations, Kirkingburg's amblyopia constitutes a substantial limitation of the major life activities related to seeing.

¹⁶ Clearly, affirming the Ninth Circuit's decision in this case would not mean that every person who wears eye glasses has a disability under the ADA by virtue of that fact alone.

II. THE TEXT AND PURPOSE OF THE ADA DEMONSTRATE THAT CERTAIN IMPAIRMENTS INVARIABLY MEET THE STATUTORY DEFINITION OF DISABILITY.

The petitioner's first question presented raises the threshold issue of whether some impairments are "per se" disabilities. The Ninth Circuit never addressed the issue and no ruling on this question is necessary to affirm the Ninth Circuit's opinion.

Moreover, the phrase "per se disability" is something of a misnomer. The words "per se" imply that some impairments are simply deemed to be disabilities without regard to the ADA's definition. To the contrary, as the Ninth Circuit implicitly recognized, the ADA does not provide for a specific list of exempt or categorical disabilities. But neither does it demand that plaintiffs pass through insurmountable hurdles of proof. Rather, the definition should be applied in accordance with its plain meaning and simple common sense. When that is done, it will be obvious that some impairments will always be disabilities.

By their medical nature, some impairments always substantially limit major life activities. A spinal cord injury, a laryngectomy (which requires use of a voice box for speech), loss of a limb, and cerebral palsy, for example, each have an inherently substantial impact on a number of recognized major life activities. In those cases, nothing in the ADA's text requires the individual to provide particularized proof of the nature and extent to which the impairment limits his or her major life activities.

Other impairments may not be universally severe or have universal consequences for each person with the impairment. For example, allergies and asthma are not

substantially limiting for every person with either impairment, although they are for many. In other words, some impairments have a wide range of possible consequences from *de minimis* to life-threatening. The phrases "with respect to an individual" and "of such individual" in the ADA's definition of disability broaden that statute, rather than narrow it. This language permits persons with impairments that are not always substantially limiting to make an individualized showing of disability.

The statute's text and purpose implicitly indicates that some conditions have such predictable consequences that they readily may be treated as disabilities. The ADA's text frequently refers to a "class of individuals with disabilities," suggesting that there are some impairments which are always disabilities, and therefore can be treated as a class. *See, e.g.*, 42 U.S.C. § 12182(b)(2)(A)(i); 42 U.S.C. § 12112(b)(6). Indeed, much of the ADA's text makes sense only if there are categories of disability which can be prospectively identified. For example, the ADA prohibits certain medical examinations to determine whether an individual has a disability.¹⁷ This assumes that it can be known whether one has a disability before an individualized assessment is undertaken. The ADA also contains numerous provisions requiring that buildings and transportation systems be designed and operated in order to be accessible to "individuals with disabilities."¹⁸ These provisions support the

¹⁷ *See* 42 U.S.C. § 12112(d) (prohibiting covered entity from making inquiry of a job applicant as to "whether such applicant is an individual with a disability or as to the nature or severity of such disability" and limiting such inquiries about "disability" subsequent to a job offer and during employment).

¹⁸ *See, e.g.*, 42 U.S.C. § 12142 (requiring that certain public buses and rail vehicles be "readily accessible to and usable by individuals

conclusion that there are impairments which by their very nature can be identified as disabilities. If not, the very idea of designing a building to be accessible would be nonsensical, as no architect could determine before a building was built whether future patrons would qualify as individuals with disabilities.

Congress intended to provide "consistent, enforceable" standards in order to eliminate discrimination against individuals with disabilities. *See* 42 U.S.C. § 12101(b)(2). Consistent and enforceable standards also are necessary so that employers can prospectively apply the ADA's provisions to increase accessibility or modify programs. For example, the ADA requires that employers make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the accommodations would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). This provision would be inoperable in the workplace if a determination of disability required a fact-intensive, highly particularized assessment of each individual's medical symptoms. Parties would be required to expend significant resources on discovery and development of expert medical testimony in

with disabilities, including individuals who use wheelchairs"); 42 U.S.C. § 12143-12165 (specifying compliance requirements in public transportation for "individuals with disabilities, including individuals who use wheelchairs"); 42 U.S.C. § 12184(3) (prohibiting acquisition after a certain date of vehicles not "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs"); 42 U.S.C. § 12185 (mandating that the Office of Technology Assessment shall undertake a study to determine needs of "individuals with disabilities" to use and access buses); 42 U.S.C. § 12204 (mandating that Architectural and Transportation Barriers Compliance Board issue guidelines ensuring that "buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities").

litigation over whether a plaintiff meets the Act's definition of disability, rather than reaching the merits of a particular case. The ADA would become merely an ineffective and expensive litigation tool, rather than a statute designed to open doors of opportunity. Individuals and covered entities alike could never know in advance what conduct is prohibited.

This textual analysis is confirmed by the EEOC's conclusion that some impairments, such as HIV, are inherently substantially limiting. *See* 29 C.F.R. § 1630, App. 1630.2(j) (1997). The ADA's legislative history also reinforces the clear intent of the statutory language that some impairments are always disabilities. *See, e.g.,* H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. at 52 (identifying paraplegia, deafness, lung disease, and HIV as disabilities).¹⁹

In order to effectuate Congress' intent to create opportunity, courts should apply a common sense approach to determining who is an individual with a disability under the ADA. When an impairment is reasonably understood to be universally limiting, courts should not require highly particularized proof of a person's symptoms and conditions to find coverage under the ADA. Instead, courts should assume that if a reasonable person would find that an individual with

¹⁹ In the legislative history, Congress was explicit about the provisions of the ADA which required an individualized, case-by-case assessment. For example, Congress stated that the determination of reasonable accommodation is a "fact-specific case-by-case approach" and must be determined on "particular facts." *See* S. Rep. No. 116, 101st Cong., 1st Sess. at 31 (1989). Similarly, Congress was explicit that the determination of "direct threat" "must be made on a case-by-case basis ... [and] requires a fact-specific individualized inquiry..." *Id.* at 27. Although each of the committee reports discusses the definition of "individual with disability" in depth, none discusses the need for a particularized assessment of whether an individual has a "disability."

plaintiff's impairment would be substantially limited in some major life activity, the plaintiff should be protected by the statute. Any other interpretation would illogically shift the focus of determining a valid claim under the ADA from whether an employer's action was inappropriately based on disability, to an exacting analysis of the specific effects of an individual's impairments which bear no relation to the question of whether the discriminatory conduct in question is actionable.

III. THE ADA'S COVERAGE OF INDIVIDUALS REGARDED AS DISABLED REFLECTS CONGRESS' RECOGNITION THAT GROUNDLESS FEARS AND STEREOTYPES CAUSE DISCRIMINATION AGAINST QUALIFIED INDIVIDUALS.

A. An Employer Violates The ADA When It Acts On Inaccurate Assumptions Or Beliefs That An Individual's Mental Or Physical Characteristics Make That Individual Unqualified Or Unsafe To Retain In An Employment Position.

The second and third prongs of the ADA's definition of an individual with a disability extend coverage to those who have a record of having a substantially limiting impairment or who are "regarded as" having such an impairment. 42 U.S.C. § 12102(2). In adopting the Rehabilitation Act's expanded definition of disability, Congress made clear that potentially protected individuals would include those who "may at present have no actual incapacity at all."²⁰

²⁰ Explaining the 1974 amendment expanding the definition of protected individuals under the Rehabilitation Act, the Senate report

The Senate Committee Report on the 1974 amendments to the Rehabilitation Act explained the basis for expanding the definition to include a third prong covering persons who are "regarded as" having a disability:

Clause [iii] in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause [i] in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

S. Rep. No. 93-1297, at 39. *See also Arline*, 480 U.S. at 279 (Rehabilitation Act's "regarded as" disabled provision was intended to combat the effects of archaic attitudes and

recognized that individuals "are discriminated against when they are, in fact, handicapped . . . [or] when they are classified or labeled, correctly or incorrectly, as handicapped . . . [or] if they are regarded as handicapped, regardless of whether they are in fact handicapped." S. Rep. No. 93-1297 (1974).

Title I also prohibits discrimination on the basis of an association with a person with a disability. 42 U.S.C. § 12112(b)(4). In ADA claims invoking this provision, the employee is protected despite the individual's lack of any physical or mental impairment.

erroneous perceptions that disadvantage persons with, or regarded as having, disabilities.).²¹

The ADA's use of a three-pronged definition of disability was created to ensure that individuals who have been singled out for discriminatory treatment on the basis of an employer's or covered entity's preconceptions about their physical or mental capabilities be afforded employment opportunities, services and public accommodations previously unavailable to them. An author of the ADA states:

The recognition that "individuals with disabilities" is a classification created by societal mechanisms that have singled out some people and caused them to be treated differently from others because of real or perceived mental or physical impairments has profound consequences. It explains the overriding importance of the third prong of the definition of disability. If one is regarded as having a substantial impairment by others, then one has a disability. Satisfaction of this prong focuses solely on whether a person has been singled out for different treatment, not upon whatever physical or mental characteristics the person possesses.

Burgdorf, *"Substantially Limited" Protection*, 42 VILL. L. REV. 409, at 527; see also, e.g., *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (in determining whether an individual is "regarded as" disabled, the court's focus is on the impairment's effect upon the attitudes of others).

²¹ See also H.R. Rep. No. 101-485, pt. 2, at 53, reprinted in 1990 U.S.C.C.A.N. 303, 335 (noting reasoning in *Arline* that the third prong of § 504's definition of disability is designed to protect individuals who have impairments that do not substantially limit their major life functions).

Congress made it clear that, in determining coverage under the ADA's third, "regarded as" prong, the focus of the inquiry appropriately rests on the conduct and motivation of the defendant rather than on the actual extent of the plaintiff's impairment. The Senate Committee Report's examples of individuals protected under the third prong include "people who are rejected for a particular job . . . because of findings of a back abnormality in an x-ray, notwithstanding the absence of any symptoms, or people who are rejected for a particular job solely because they wear hearing aids." S. Rep. No. 101-116, at 24 (1989).²² In these examples, the back abnormality may be of no practical physical consequence and the hearing aids may improve an individual's ability to hear, but these factors are not dispositive of, or even central to, the inquiry. The Senate Report continues:

A person who is excluded from any activity covered under this Act or is otherwise discriminated against *because of a covered entity's negative attitudes towards a disability is being treated as having a disability which affects a major life activity*. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to

²² The legislative history also offers as examples of individuals who would be entitled to ADA protection because they are "regarded as" disabled: 1) a disfigured burn victim who is denied work due to the employer's discomfort with the applicant's appearance; and 2) an individual whose pre-employment physical reveals a back abnormality and who is refused employment because of the employer's fears of increased insurance or workers' compensation costs due to injury. See H.R. Rep. No. 101-485(III), at 30-31 (1990), reprinted in 1990 U.S.C.C.A.N. 452, 45-53.

hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.

Id. (emphasis added). The Senate Report also cites *Thornhill v. Marsh*, a Rehabilitation Act case which held that an employee fired by the Army Corp of Engineers on the basis of its erroneous perception that the employee's congenital spine abnormality "impos[ed] a disqualifying limitation on his ability to lift weight" is an "individual with a handicap" under the "regarded as" prong of the Act. *Id.*, citing *Thornhill v. Marsh*, 866 F.2d 1182, 1183-84 (9th Cir. 1989).

The House Judiciary Committee Report on the ADA echoed this intended coverage under the ADA's "regarded as" prong, noting that "a person who is rejected from a job because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition." See H.R. Rep. No. 101-485, at 30; Burgdorf, *"Substantially Limited" Protection*, 42 VILL. L. REV. 409, at 450-51. This form of protection is essential, due to the "common barriers that frequently result in excluding disabled persons. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers." *Id.* None of these barriers necessarily are related to the degree, or actual existence, of a particular individual's impairment.

The inclusion of the "regarded as" definition of disability, and Congress' intention of the role it should play in determining the applicability of the ADA, reflects a common

sense, reality-based understanding of the core nature of disability-based discrimination, and the nature of the public good Congress expected to achieve through this legislation. After all, the ADA was enacted to end the exclusion of individuals with disabilities from employment and services on the basis of stereotypical assumptions that do not reflect their ability to participate and contribute to society. It was never the goal of either Congress or advocates of the ADA to require that employers be required to hire and maintain employees whose impairments actually precluded them from performing a particular job. Rather, the intended beneficiaries of Title I of the ADA are those whose capacity for employment and economic self-sufficiency is thwarted by the assumptions and prejudices of those who are uncomfortable with difference and equate disability with lack of ability.

This reality, and Congress' intent, is reflected in the EEOC's regulations implementing the Act. The regulations provide that an individual is a person with a disability under the "regarded as" prong if 1) the impairment itself does not substantially limit a major life activity but is treated by an employer as having such a limitation; 2) the impairment substantially limits a major life activity only as a result of others' attitudes towards the impairment; or 3) the individual does not have a substantially limiting impairment but is treated by an employer as such. 29 C.F.R. § 1630.2(1). The terms of these regulations are almost identical to earlier regulations adopted under § 504 of the Rehabilitation Act.²³

²³ See 45 C.F.R. § 84.3(j)(2)(iv) ("Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient [of federal funds] as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none

Even if the Court were to conclude that Kirkingburg's impairment alone does not substantially limit a major life activity, clearly Albertsons treated him as if it does.

B. Albertsons Regarded Kirkingburg As Disabled Because It Fired Him On The Basis Of His Vision Impairment Rather Than On The Basis Of His Skills And Abilities To Perform The Job At Issue.

Albertsons fired Kirkingburg on the basis of its policy of employing only drivers whose vision tests satisfied Department of Transportation ("DOT") regular commercial driver vision requirements. Hallie Kirkingburg has been driving commercial trucks since 1979, has, in the words of the Ninth Circuit, an "impeccable" driving record, and was assessed by Albertsons' transportation manager as possessing "superior driving skill." *Kirkingburg*, 143 F.3d at 1230. As Albertsons recognizes, in order to secure a waiver of the DOT regular vision requirements, Kirkingburg had to be examined by an optometrist or ophthalmologist who performed certain tests and concluded that he was "able to perform the driving tasks required to operate a commercial motor vehicle." Petitioner's Brief at 9, *citing* Federal Highway Administration ("FHWA"), Qualification of Drivers, 57 Fed. Reg. 31458, 31460 (1992). Nonetheless, Albertsons concluded that Kirkingburg could not satisfy his job requirements solely because of his impairment, and even though the DOT itself has determined that its regular requirements for certification can be waived under certain circumstances without compromising safe driving standards. There can be little doubt that Albertsons regarded Kirkingburg as disabled by basing its employment decision on his vision impairment.

of the [above defined] impairments . . . but is treated by a recipient as having such an impairment.).

Indeed, Albertsons' insistence that satisfying the DOT's regular vision requirements for certification is an "essential function" of the job, and its rejection of that portion of the DOT regulations adopted to bring DOT into compliance with federal disability antidiscrimination law, underscores the fact that Albertsons regards *anyone* with that level of vision impairment as disabled. There is little practical difference between this job requirement and a job description making full use of both legs an essential function of teaching children in a day care center.

The ADA permits "qualification standards, tests or selection criteria" only when the *employer can show that such criteria are "job-related and consistent with business necessity."* 42 U.S.C. § 12113(a) (emphasis added). It is indisputable that in some professions, an employee's ability to satisfy certain medical criteria is essential for job safety; tuberculosis screening for restaurant and health care workers, the ability to see well enough to pilot a plane or drive a truck safely, clearly are job-related and consistent with business necessity. However, Congress indicated that while the ADA is not intended to override "legitimate medical standards established by federal, state or local law, or by employers for applicants for safety or security sensitive positions," such criteria can stand only "if the medical standards are consistent with [the ADA]." *Id.*

Reliance on physical or mental requirements that are not necessary to ensure that a particular job is performed safely and well -- as is the case here, in which Kirkingburg was examined by an eye specialist and found "able to perform the driving tasks required to operate a commercial motor vehicle" -- constitutes a quintessential example of conduct which satisfies the "regarded as" definition of disability. This is explicitly recognized in the opening provisions of the ADA, which identify "exclusionary qualification standards and

criteria" as a type of discrimination individuals with disabilities routinely encounter. See 42 U.S.C. § 12101(a)(5).²⁴ The fact that performing the actual essential functions of a position may be easier without an impairment does not place incorporation of an impairment-free requirement into a job description beyond judicial scrutiny.²⁵

Albertsons' contradictory characterizations of Kirkingburg's vision for the purposes of his job qualifications and for the purposes of coverage as an individual with a disability aptly illustrates the "lose if you can, lose if you can't" interpretation of the Act's definition of disability that has been employed to frustrate legitimate discrimination claims. It conflates the definition of disability with the subsequent determination of whether an individual is qualified to perform a particular job, and attempts to substitute an either-or analysis which recognizes only two categories of individuals — those completely without disabilities and those completely disabled — for the reality in which "there are spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional." See Burgdorf,

²⁴ "The requirement that job criteria actually measure *ability* required by the job is a critical protection against discrimination based on disability." S. Rep. No. 101-116, at 9-10 (1989). The ability at issue in this case is that of seeing sufficiently well to drive a commercial vehicle safely. Albertsons confuses a *physical characteristic which contributes to* an individual's needed ability to perform a driver's essential functions with the job function itself. As the Ninth Circuit found, standard vision test results are not equivalent to this ability.

²⁵ The dissent appears to rely on the fact that the portion of the DOT vision regulations on which Albertsons relies have been in effect since 1970 as further evidence of the validity of Albertsons' position. See *Kirkingburg*, 143 F.3d at 1238. This reflects a significant misapprehension of the very purpose of the ADA, which was adopted to dismantle the institutionalization of such physical requirements which have forced qualified individuals off payrolls and on to disability rolls.

"Substantially Limited" Protection, 42 VILL. L. REV. 409, at 519 (footnote omitted) (citing U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983)).

The irrationality of the analysis advanced by Albertsons is well-illustrated by the case of *Everette v. Runyon*, 911 F. Supp. 180 (E.D.N.C. 1995), in which the district court determined that it was "impossible" for a vision-impaired individual to be both substantially limited in the major life activity of working -- one of the ways in which a plaintiff shows eligibility for protection -- and being qualified to work. *Id.* at 183-84. Employing this "lose if you are, lose if you aren't" application of disability definitions under federal law, the court was able to conclude that the plaintiff's vision limitation was too insubstantial to constitute a disability, but so substantial that it rendered him unqualified as an employee. Race discrimination cases have never been resolved through a focus on whether a plaintiff allegedly fired on the basis of race has a clearly documentable blood line showing membership in the protected class. An employer who is motivated by racial animus in terminating a worker does not escape liability under Title VII because it is mistaken about the worker's actual racial heritage.²⁶

Indeed, when it amended the Rehabilitation Act in 1974 to include persons regarded as disabled, Congress

²⁶ In *Perkins v. Lake County Dept. of Utilities*, 860 F. Supp. 1262, 1278 (N.D. Ohio 1994), the court explained that "for purposes of entitlement to relief under Title VII, [it is] unnecessary, and indeed inappropriate, to attempt to measure Plaintiff's percentage of Indian blood or to examine his documentable connection to recognized existing tribes. Employers do not discriminate on the basis of such factors. Objective appearance and employer perception are the basis for discrimination and . . . the key factors relevant to enforcing rights granted members of a protected class."

analogized to Title VII's employment protections for persons mistakenly thought to be members of a racial minority. See S. Rep. No. 93-1297, at 38-39 (1974). Yet the ADA, created to prohibit conduct which classifies, segregates and excludes individuals with disabilities, has been applied in a manner in which the focus in determining whether a case can go forward typically has been on the particular nature and extent of the limitations of the plaintiff. The ironic unfairness of this approach is manifest:

For discrimination based on disability, the focus on the limitations and capabilities of plaintiffs is particularly unfortunate. . . . [A] major form of disability discrimination is differentiating, classifying and labeling people as disabled. Proving that one is disabled is the direct antithesis of the goals underlying the nondiscrimination mandates of the ADA. . . . Having to turn around and prove that, despite having a disability, one is not so disabled that one cannot do the job that one has been performing or has applied for simply adds insult to injury.

Burgdorf, *"Substantially Limited" Protection*, 42 VILL. L. REV. 409, at 561. The "otherwise qualified" language of the ADA was not included to limit or qualify the expansive definition of disability set forth in the Act's three-pronged definition, but to make it clear that employers have no obligation to hire or retain employees who cannot perform the essential functions of the job in question.

Albertsons has characterized Kirkingburg as too sight-impaired for purposes of employment, yet not sufficiently impaired for protection from discriminatory assumptions based on his vision impairment. The fact that this simplistic, and self-serving, form of characterization reflects anachronistic policies on the treatment of individuals with

sight impairments and other disabilities is no basis for its post-ADA continued tolerance by the courts.²⁷

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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²⁷ For example, despite the statutory language, legislative history, and clear guidance of the EEOC regulations, a number of courts have insisted that plaintiffs claiming protection under the "regarded as" prong also document a substantial limitation of a major life activity in order to sustain a claim under the ADA. See, e.g., *Wooten*, 58 F.3d at 385 (plaintiff was not "regarded as" disabled because he suffered from an impairment which did not limit any of his major life activities); *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1419 (10th Cir. 1992) (plaintiff without substantial limitation of major life activity could not maintain claim that he was "regarded as" disabled).

APPENDIX

AARP is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-two million members are employed. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has, since 1985, filed more than 180 *amicus curiae* briefs before this Court and the Federal appellate and district courts.

AIDS Policy Center for Children, Youth & Families is a national nonprofit organization founded in 1994 to help respond to the unique concerns of children, youth, women, and families living with, affected by, or at risk for HIV/AIDS. AIDS Policy Center conducts policy research, education, and advocacy on a broad range of HIV/AIDS prevention, care, and research issues. Its membership includes individuals and organizations throughout the United States.

The Alliance for Rehabilitation Counseling is an affiliative organization of the National Rehabilitation Counseling Association and the American Rehabilitation Counseling Association. The Alliances's almost 5,000 members are professional rehabilitation counselors, many of whom work directly as rehabilitation counselors and others of whom are rehabilitation educators, rehabilitation administrators and students pursuing a masters degree in rehabilitation counseling. The Alliance is dedicated to the pursuit of the self-fulfillment of all persons with disabilities. The purpose of the Alliance is to advance and improve the profession of Rehabilitation Counseling in its core mission of service to persons with disabilities.

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professional and other persons who work exclusively in the field of mental retardation. AAMR promotes progressive policies, sound research, effective practices, and human rights for people with intellectual disabilities.

The American Medical Student Association ("AMSA") is an independent student-run organization of nearly 30,000 physicians-in-training members from 143 allopathic and 17 osteopathic medical schools across the country. Founded in 1950, AMSA is committed to improving health care and health care delivery to all people, promoting active improvement in medical education, involving its members in the social, moral and ethical obligations of the profession of medicine, assisting in the improvements and understanding of world health problems, contributing to the welfare of medical students, interns, residents and post MD/DO trainees, and advancing the profession of medicine. AMSA believes the burden of proof of judgment, reliability, capability, or entitlement to a position for individuals with a disability should not be greater than or different from that placed on other persons.

The Arc of the United States ("The Arc"), through its more than 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million people with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

The Brain Injury Association, Inc. ("BIA") is the only national non-profit organization dedicated to improving the quality of life of persons with brain injury, as well as promoting research, education and prevention of brain injuries. BIA has 42 state associations and serves persons with brain injury, their families and care givers in all 50 states and territories. BIA represents and advocates with and on behalf of the estimated 2.5 to 6.5 million persons with moderate to severe brain injuries in the United States. Many persons with brain injury are recipients of Social Security Disability Insurance ("SSDI") and/or Supplemental Security Income ("SSI"). As a result of changes in rehabilitation programs, an increasing number of persons with brain injury are gainfully employed. Part of BIA's mission is to assure that all persons with brain injury are afforded the protections of the Americans with Disabilities Act. The disposition of this case will affect the ability of persons with brain injury to have access to and security in employment without losing their entitlement to SSDI and/or SSI.

The Center for Women Policy Studies is a national nonprofit, multiethnic and multicultural feminist policy research and advocacy institution founded in 1972. In 1987 the Center founded the National Resource Center on Women and AIDS Policy and has been a leader in addressing critical AIDS policy issues from women's diverse perspectives. The Resource Center has produced more than 30 research, advocacy and policy reports since its inception, including an analysis of the Social Security Administration rules for determining eligibility for HIV-related disability in women. The Center's Metro DC Collaborative for Women with HIV/AIDS Project works directly with low income women living with HIV who will be directly impacted by the ruling in this case.

The Committee For Children is a national advocacy group with an interest in all aspects of child protection, health, education, and fighting the exploitation of children.

Disabled in Action of Metropolitan New York ("DIA"), a civil rights organization founded in 1970 by Judith Heumann, is committed to ending discrimination against people with disabilities — all disabilities. Over the years, DIA has participated in rallies and demonstrations, as well as initiated and joined lawsuits dealing with such issues as access to wheelchair accessible buses and polling sites, personal assistance services, and appropriate health care for all people. As a grassroots group, many DIA members attempted to obtain jobs but now rely on SSI and SSDI for their necessary living expenses because they ran into considerable and frustrating discrimination when they pursued employment.

The Employment Law Center ("ELC") is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The Center's interest in the legal rights of those with disabilities is longstanding. The ELC has and is representing clients faced with discrimination on the basis of their disabilities, including clients with claims brought under Title II of the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to disabled persons.

The Epilepsy Foundation of America (also known as the Epilepsy Foundation) is a nonprofit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. Together with its

affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures, promotes public understanding of the disorder, and supports research, professional awareness and advocacy on behalf of people with seizure disorders. The term "epilepsy" evokes stereotyped images and fears which affect persons with this medical condition in all aspects of life, including, and especially, employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with seizures and has supported the development of laws which protect individuals from discrimination based on these stereotypes and fears.

Gay and Lesbian Advocates and Defenders ("GLAD") is a nonprofit public interest law firm, headquartered in Boston, Massachusetts and serving the six New England states. GLAD's mission is to protect and enhance the rights of lesbians, gay men, bisexuals and people living with HIV through litigation, education and advocacy.

Justice For All ("JFA") is a not-for-profit entity created in 1994. JFA serves as an advocate for the disability community and is dedicated to protecting, implementing, and strengthening the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and all existing programs and policies that empower people with disabilities. The JFA works in cooperation with other organizations to facilitate the coordination of advocacy and the exchange of information among all national, state and local disability groups.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda

is the oldest and largest legal organization addressing these concerns. In 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities, including, in part, *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998); *Doe & Smith v. Mutual of Omaha Insurance Company*, 1998 WL 166856 (N.D. Ill. April 3, 1998); *School Bd. for Nassau County v. Arline*, 480 U.S. 273 (1987); *Chalk v. U.S. District Court*, 814 F.2d 701 (9th Cir. 1988); *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991); and *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (1996). Lambda is particularly familiar with the unique barriers confronting persons with HIV, AIDS and other disabilities who attempt to secure equal employment opportunities.

The Legal Action Center is a nonprofit law and policy organization specializing in AIDS, alcohol, and drug issues. The Center's attorneys, who helped draft the ADA protections, represent individuals with alcoholism, drug dependence, and HIV disease and the programs that serve them to resolve discriminatory practices in employment, health care, housing, and zoning.

The National Association of People with AIDS ("NAPWA"), founded in 1983, advocates on behalf of all people living with HIV and AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801 *et seq.*, and the Protection and Advocacy for

Individual Rights Program, 29 U.S.C. § 794e, to provide legal representation and related advocacy services on behalf of all persons with disabilities. In fiscal year 1997 alone, P&As served well over 700,000 people with disabilities through a variety of mechanisms: individual case representation, systemic advocacy, information and referral and education efforts. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance and represents their interests before the Executive and Legislative Branches of government.

New York Lawyers for the Public Interest, Inc., ("NYLPI") is a non-profit public interest law office founded in 1977 which practices disability, health and environmental justice law. Under contracts with the New York State Commission on Quality of Care for the Mentally Disabled, it operates four federally-authorized Protection and Advocacy programs in New York City, and serves people with all types of disabilities in a wide variety of issues. *See* 29 U.S.C. §732; 42 U.S.C. §§6041 *et seq.*; 42 U.S.C. §§10801 *et seq.*; and 29 U.S.C. §794e. NYLPI handles a broad array of matters involving the Americans with Disabilities Act and similar laws.

Self Help for Hard of Hearing People, Inc. ("SHHH") is a national membership organization of hard of hearing people of all ages, their families, friends, and interested professionals. With a national headquarters, eight state associations and 250 chapters and groups nationwide, SHHH is dedicated to addressing the needs and interests of people who wish to use their residual hearing. The constituency, an estimated 26 million hard of hearing people in the U.S., use hearing aids, assistive technology, and communication strategies to continue functioning in all aspects of daily living. Founded in 1979, SHHH's mission is to make mainstream society more accessible to people who are hard of

hearing through education, advocacy, and self help. Part of that mission is to assure that all people who are hard of hearing are afforded the protections of the Americans with Disabilities Act.

The Title II Community AIDS National Network, Inc. ("T-II CANN") is incorporated as a not-for-profit corporation and represents the interests of service providers and their clients who receive services funded under Title II of the Ryan White CARE Act. T-II CANN provides technical assistance, information, communications, publications and advocacy training in issues ranging from the AIDS Drug Assistance Program, Medicaid, Medicare, AIDS-related health insurance, and benefits. T-II CANN supports finding a cure for HIV/AIDS and ensuring that access to that cure is available for all people living with HIV/AIDS. Until a cure is discovered, T-II CANN will advocate for effective treatments for HIV/AIDS and universal access to those treatments for all people living with HIV/AIDS.

The Union of American Hebrew Congregations ("UAHC") is the synagogue arm of the Reform Jewish movement, representing some 850 congregations and 1.5 million members nationwide. For over a century, the UAHC has fought passionately for religious liberty and tolerance for all Americans, believing these to be among the greatest gifts America has bestowed upon its citizens of the world. The UAHC played an active role in securing the passage of the ADA.